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Volume 34 No. 4 2001

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Indiana Law Review

Volume 34

2000-2001



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(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

Subscriptions. Current subscription rates for an academic year are \$30.00 per four-issue (domestic mailing) and \$35.00 (foreign mailing). Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. *Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.*

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The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility thereof. Current subscription rates for an academic year are: one year domestic \$30.00; foreign \$35.00. Send all correspondence to Editorial Specialist, *Indiana Law Review*, Indiana University School of Law—Indianapolis, 530 W. New York Street, Indianapolis, Indiana 46202-3225. Publication office: 530 W. New York Street, Indianapolis, Indiana 46202-3225. Periodicals postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, 530 W. New York Street, Indianapolis, Indiana 46202-3225.



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Indiana Law Review

Volume 34

2001

Number 4

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ARTICLES

THE ROLE OF RESIDENTIAL SEGREGATION IN PROMOTING AND MAINTAINING INEQUALITY IN WEALTH AND PROPERTY

NANCY A. DENTON*

INTRODUCTION

Most people desire wealth and property. Individuals and families acquire wealth and property via three routes: they accumulate them through their earnings or other work, what they have accumulated appreciates over time, or they inherit wealth or property from their families. Many benefit from all three of these routes to the ownership of property and wealth. For some, the routes are interconnected, as when parents, prior to their death, transfer assets to enable their children to attend school, start a business, or purchase a home. In theory (and in law), these routes to the acquisition of wealth and property are available to all. They are not structured by race or ethnicity. The argument in this paper, however, is that in reality, the routes to the ownership of wealth and property are severely constrained by race/ethnicity working through residential segregation. As a result, residential segregation helped create and continues to perpetuate inequality.

In making this argument, my goal is to shift the focus of discussions of residential segregation. Much of the popular and scientific discussion of residential segregation in the past decade, including some of my own work, has focused too narrowly on the consequences of segregation for those at the bottom of the income distribution. Sometimes popularly referred to as "the underclass,"¹ these victims of segregation clearly suffer severe consequences. Though their circumstances warrant discussion, they are not the only people affected by residential segregation.

Limiting discussions of residential segregation to residents of ghetto poverty neighborhoods limits the discussion to people thought to be very different from those doing the discussing or the research, most of whom are middle or upper class. As a result, concentrated poverty neighborhood residents' individual behaviors concerning schooling, childbearing and labor force participation are

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1. See, e.g., KEN AULETTA, *THE UNDERCLASS* (1982); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

emphasized without considering the social structure. Behaviors that are the result of living in highly segregated environments are seen as individual choices and used to generate fear in the minds of many non-poor people of all races.² The consequences of segregation for the working class and middle class people whose lives include jobs and families similar to our own are mentioned only in passing, if at all.

The exclusive focus on the severe effects of segregation for the underclass has two additional consequences. First, the contrast between the very poor and the middle class is a false dichotomy. Most people are not poor, and many are members of the working class or the working poor.³ If, as a result of segregation, working class people of color find their socioeconomic prospects less related to their individual efforts than do similarly situated whites, then their escape from the most devastating consequences of segregation associated with the underclass in no way implies they are unaffected by segregation. Second, discussing only the underclass has permitted some commentators to argue that members of the middle class who desire integration can readily achieve it,⁴ thus attributing remaining segregation solely to preferences. In this view, then, segregation, which constrains people's ability to acquire wealth and property, is viewed as benign. The desire of African Americans to live with their own group⁵ is assumed to be stronger than their desire to acquire wealth and property, a situation not assumed for members of other race/ethnic groups.

In short, we need to show the variety of mechanisms through which segregation can and does block individuals' and families' access to the routes to acquisition of wealth and property. Showing how segregation has consequences for all residents of highly segregated neighborhoods, regardless of their race, and often, regardless of their efforts to succeed in life, will reframe the discussion of why segregation is an important and negative factor in contemporary urban life.

The first part of this paper presents a thirty-year summary of trends in residential segregation in major metropolitan areas in the United States. A familiar story to many, it updates the results presented in *American Apartheid: Segregation and the Making of the Underclass*⁶ and compares the segregation of African Americans to that of Asian and Hispanic Americans. The second part of this paper briefly outlines changes in segregation the author anticipates from Census 2000. The paper then moves to an explication of the main argument that segregation limits the possibilities for wealth and property accumulation for all segregated people, not only the poorest. It concludes by briefly commenting on

2. See Craig St. John & Tamara Heald-Moore, *Fear of Black Strangers*, 24 SOC. SCI. RES. 262, 262-80 (1995).

3. See Hayward Derrick Horton et al., *Lost in the Storm: The Sociology of the Black Working Class, 1850 to 1990*, 65 AM. SOC. REV. 128, 128-37 (2000).

4. See ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* (1997).

5. See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997).

6. See MASSEY & DENTON, *supra* note 1.

limited sources of optimism for future change in segregation and race or ethnic inequality more generally.

I. OVERVIEW OF RESIDENTIAL SEGREGATION IN THE LAST THIRTY YEARS

Research on patterns of residential segregation based on the censuses of 1970, 1980 and 1990 is unanimous in one conclusion: African Americans are the most residentially segregated group in the United States, followed by Latinos and Asians, respectively. This conclusion holds up across studies, regardless of whether we measure segregation from non-Hispanic whites (the dominant group numerically) or segregation from all racial and ethnic groups other than the particular group being measured. Table One quantifies this statement, showing trends in segregation for blacks, Hispanics and Asians in five large U.S. metro areas for each of the last three censuses.⁷ For example, in San Francisco, segregation of African Americans fell eight points between 1970 and 1980 and another five points between 1980 and 1990, but their segregation in 1990 is still in what is normally considered the “high” range of segregation scores.⁸ In contrast, due to increased immigration, the segregation of Hispanics in San Francisco increased fifteen points, but it started from a much lower initial level and remained at a moderate level. Though also experiencing extensive immigration, the segregation of Asians declined significantly between 1970 and 1990. The difference between the Hispanic and Asian segregation patterns reflects the different economic status of the two groups.

Even when more than five metropolitan areas are examined, the general pattern remains the same. Reynolds Farley and William H. Frey looked at all metropolitan areas and found “a pervasive pattern of modest declines” but the same racial differences.⁹ Black segregation fell from sixty-nine to sixty-four and declined in 194 of the 232 metropolitan areas they studied, while the average segregation of both Hispanic and Asian groups rose slightly between 1980 and 1990, from forty-two to forty-three for Hispanics and forty-one to forty-three for Asians.¹⁰ Such increases are undoubtedly due to the large immigrant population among these groups, because newcomers often initially settle near members of their own group. But the fact remains that African Americans are much more segregated than either of these groups. In 1980, Douglas Massey and the author called the extreme pattern of segregation for African Americans

7. See Table 1, *infra*.

8. Segregation scores above 60 are considered “high,” those between 30 and 60 “moderate,” and those below 30 “low.” See NATHAN KANTROWITZ, *ETHNIC AND RACIAL SEGREGATION IN THE NEW YORK METROPOLIS: RESIDENTIAL PATTERNS AMONG WHITE ETHNIC GROUPS, BLACKS, AND PUERTO RICANS* (1973).

9. Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 30 (1994).

10. See *id.* at 30-31.

"hypersegregation,"¹¹ and further research with 1990 data shows that hypersegregation has not abated for African Americans.¹² Taken together, the results from these research studies point to substantial differences in residential segregation across groups but relative persistence of a particular group's segregation over time.

Because this paper's main argument is that segregation affects those who are not at the very bottom of the income distribution, it is important to know if and how much segregation decreases as income increases. Research on this point is unanimous. High levels of segregation persist across the entire income distribution for African Americans in 1990¹³ as they did in 1980,¹⁴ while segregation declines more sharply as income increases for Asians and Hispanics. Panel A of Table Two illustrates the 1990 changes in segregation in relation to increased income of African Americans, Hispanics and Asians.¹⁵ Clearly, African American segregation is higher than Asian or Hispanic segregation at all income levels.¹⁶ But more importantly, black segregation falls most between the lowest and next lowest income categories, namely between the poor and the lower middle class, but remains relatively constant for all incomes above that. In contrast, the levels of Hispanic and Asian segregation decline monotonically, indicating that moving up the class structure yields gains in integration. The implications of this pattern are particularly important: once out of the very bottom of the income distribution, African Americans face a situation where their residential opportunities are stagnant, whereas Asians and Hispanics see continual gains in residential integration (and presumably corresponding increases in neighborhood-linked opportunities for wealth accumulation) at each step of the income ladder. As a result, the American ideology of "working one's way up" is much more available to Hispanics and Asians than African Americans.

11. See Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 373-91 (1989).

12. See Nancy A. Denton, *Are African Americans Still Hypersegregated?*, in RESIDENTIAL APARTHEID: THE AMERICAN LEGACY, 49-81 (Robert D. Bullard et al. eds., 1994).

13. See Douglas S. Massey & Mary J. Fischer, *Does Rising Income Bring Integration? New Results for Blacks, Hispanics, and Asians in 1990*, 28 SOC. SCI. RES. 316, 316-26 (1999).

14. See Nancy A. Denton & Douglas S. Massey, *Residential Segregation of Blacks, Hispanics, and Asians by Socioeconomic Status and Generation*, 69 SOC. SCI. Q. 797, 797-817 (1988).

15. See Table 2, *infra*.

16. See *id.* Other research indicates that higher status blacks have more opportunity to interact with whites of the same status in their neighborhoods than do lower status blacks, a finding which has important implications for interaction. See Craig St. John & Robert Clymer, *Racial Residential Segregation by Level of Socioeconomic Status*, 81 SOC. SCI. Q. 701, 701-15 (2000). However, they still do not live in the neighborhoods where higher status whites live and therefore miss out on neighborhood benefits. See Richard D. Alba et al., *How Segregated Are Middle-Class African Americans?*, 47 SOCIAL PROBLEMS 543-58 (2000).

The results just discussed are for all metropolitan areas, but spatial assimilation often involves suburbanization. Panels B and C of Table Two illustrate the segregation of blacks, Hispanics and Asians computed for central cities and suburbs separately. This pattern of segregation persists for all metropolitan areas, though at different levels. At all income levels, segregation is higher in central cities than suburbs, and above the lowest income category, segregation declines associated with income gains are most evident for Hispanics and not present for African Americans. Although segregation is uniformly lower in the suburbs for all groups and all income categories, in both places the highest income blacks are more segregated than the lowest income Hispanics. Compared to poor Asians, the highest income blacks are more segregated in cities but about two points less segregated in suburbs. If one of the benefits of rising income is the ability to buy a better home in a better neighborhood,¹⁷ then even if segregation is lower in the suburbs, people of color may still lose neighborhood assets relative to whites of similar incomes. Massey and Fischer found that these contrasts are less pronounced in the South and West than in the Northeast and Midwest. They summarize their results:

Contrary to assertions by the Thernstroms and Patterson, therefore, racial segregation and suburbanization are not simply matters of class. Whereas upper middle class and affluent Hispanic and Asian families routinely achieve moderate levels of segregation, even within central cities, affluent blacks barely make it into the moderate range, even in suburbs, and only within the South and West.¹⁸

In summary, although declines in segregation between 1980 and 1990 are widespread, they are largest in metropolitan areas with fewer African Americans, growing metropolitan areas, new metropolitan areas, and multiethnic metropolitan areas. This is the same pattern found between 1970 and 1980. Segregation of Hispanics and Asians is lower, although it has increased in many metropolitan areas, largely because of their high levels of immigration. The most recent research on segregation by income mirrors that of the past: income is a more important determinant of neighborhood location for Asians and Hispanics than for African Americans.

II. OUTLOOK FOR SEGREGATION MEASURES FROM THE 2000 CENSUS

Given that the patterns of segregation set forth above did not show dramatic changes, it is important to consider what the latest census will show. Where (or whether) to expect change in segregation from the 2000 Census data is best predicted from where the greatest changes were seen in recent decades. Farley and Frey summarize part of the situation in 1990:

The [twenty-five] percent of metropolitan areas with the largest decreases in segregation in the 1980-1990 decade had the lowest average

17. See Alba et al., *supra* note 16.

18. Massey & Fischer, *supra* note 13, at 321.

percent black, exhibited the highest average annual growth rate for blacks over the 1980s, and the highest average annual growth rate in mean household income of blacks, suggesting that segregation may remain low in these areas.¹⁹

In addition, they identify two other sources of change associated with declines in segregation: increases in new immigrants and overall metropolitan population growth.

Table Three presents the percentage of foreign-born individuals in 1990 and 1997, as well as the percentage choosing these metropolitan areas as their intended residence in 1997 for the five metropolitan areas examined above.²⁰ Clearly, these areas are still attracting immigrants and their foreign-born population continues to grow. About one-third of the immigrants admitted to the United States in 1997 indicated these metropolitan areas as their choice of residence. During the first seven years of the last decade, all metropolitan areas experienced increases in their foreign-born population. Miami's increase was the largest, rising five percentage points. The percentage of the metropolitan area's foreign-born population in 1997 ranges from a high of nearly forty percent in Miami to a low of thirteen percent in Chicago. New York and San Francisco have approximately twenty percent and Los Angeles about thirty percent. If segregation decreased more in multi-ethnic metropolitan areas in the 1990s, as it did in the 1980s,²¹ further declines in segregation will most likely occur in these places.²²

Population growth is another factor associated with changes in segregation. Table Four depicts estimated population growth for five slow-growing metropolitan areas and for the five immigrant metropolitan areas examined above.²³ Older metropolitan areas in the Northeast and Midwest, such as Buffalo, Cleveland, Detroit, Milwaukee, and Pittsburgh, saw their populations grow only slightly during the 1990s.²⁴ These are highly segregated metropolitan areas and all were hypersegregated in 1980 through 1990. If migration patterns detected in the previous decade persisted through the 1990s, these areas will see a further decline in their white populations,²⁵ and it is unlikely that their segregation will decline appreciably. This will be particularly true if blacks are less likely to migrate from these areas to those with greater opportunity.²⁶

19. Farley & Frey, *supra* note 9, at 41.

20. See Table 3, *infra*.

21. See William H. Frey & Reynolds Farley, *Latino, Asian, and Black Segregation in U.S. Metropolitan Areas: Are Multi-ethnic Metros Different?*, 33 DEMOGRAPHY 35, 35-50 (1996).

22. Author's calculations from INS and census bureau web pages.

23. See Table 4, *infra*.

24. See *id.*; see also Census Bureau web site, at <http://www.census.gov/>.

25. See William H. Frey, *The New Geography of Population Shifts: Trends Toward Balkanization*, in STATE OF THE UNION: AMERICA IN THE 1990S, VOLUME TWO: SOCIAL TRENDS (Reynolds Farley ed., 1995).

26. See Jeffrey A. Burr et al., *Migration and Metropolitan Opportunity Structures: A*

In addition to population growth and immigration, two other factors associated with changes in segregation between 1980 and 1990 will likely play a similar role in the 1990 to 2000 period. In the 1980's segregation increased in retirement communities,²⁷ and, with the aging of the baby boom population, this effect will continue and possibly intensify. At the same time, segregation was lower in metropolitan areas with a large military presence,²⁸ such as Norfolk and San Diego. Because there is little reason to expect a dramatic increase in the military or its expansion into more areas, the effects of the military on segregation will probably remain about the same in 2000 as they were in 1990.

In short, little in the demographic estimates of current population trends suggests that the pattern of changes in segregation witnessed in the past will change when the results from the 2000 Census are available.²⁹ The dynamic, growing multi-ethnic metropolitan areas as well as those with small black populations, will continue to see their segregation decline, while older metropolitan areas with large black populations will not. Unless there is an unanticipated migration of minorities, especially African Americans, from these areas, a large proportion of the minority population in the United States will continue to live in areas in which their routes to the acquisition of property and wealth are blocked. This fact increases the importance of the question of how segregation operates to limit property and wealth acquisition.

III. HOW DOES SEGREGATION LIMIT ACCESS TO WEALTH AND PROPERTY?

Through what mechanisms does the segregation just described limit opportunities for ownership of wealth and property? Though many discussions of segregation focus on the issues of group preferences, individual attitudes, and personal identity, the focus here is on the concrete asset and wealth implications of segregation. The three major routes to wealth and property acquisition—individual accumulation, appreciation, and inheritance—will each be discussed.

Residential segregation limits individual accumulation of human capital via education and the job market. Anyone who regularly reads a metropolitan newspaper is routinely treated to articles about failing schools and low student achievement. In nearly every case these schools are located either in segregated inner city areas, or in suburban areas with large minority populations. Research also shows that living in segregated neighborhoods negatively affects student performance.³⁰ For example, Yongmin Sun found measures of community socioeconomic status to be associated with eighth grade performance in a variety

Demographic Response to Racial Inequality, 21 SOC. SCI. RES. 380, 380-405 (1992).

27. See Frey & Farley, *supra* note 21.

28. See *id.*

29. As this Article is being written, Census 2000 data are just beginning to be released. The Lewis Mumford Center at SUNY Albany is putting up segregation scores for metropolitan areas and their center cities and suburbs. The web site is <http://www.albany.edu/mumford/census/>.

30. See, e.g., Yongmin Sun, *The Contextual Effects of Community Social Capital on Academic Performance*, 28 SOC. SCI. RES. 403, 403-426 (1999).

of subjects.³¹ James Ainsworth-Darnell reached similar conclusions.³² April Pattavina found similar effects for children in all grades, while controlling for community socio-economic status and school violence.³³ In addition to its effects on educational performance and the school environment, segregation also negatively affects the chances of completing a college education because it limits home value, the asset that has the largest positive impact on college completion rates.³⁴ To the extent that people with more and higher quality education have better paying jobs, segregation limits earning opportunities.³⁵ In addition, segregated neighborhoods often lack access to job networks³⁶ and transportation to available jobs.³⁷ Conley concludes that "the value of a family's home positively affects how much offspring work when they become adults, suggesting support for spatial (neighborhood) dynamics."³⁸ By preventing residents of segregated neighborhoods from obtaining high quality educations and jobs, segregation imposes limits on how much wealth and property they can amass as a result of their own efforts, a facet overlooked in a focus on "endowments" and "returns to endowments."³⁹

Segregation also works to limit people's accumulation of wealth through asset appreciation, particularly that of houses and businesses. Especially for the middle and lower middle classes, home appreciation is a large component of wealth.⁴⁰ Of course, to realize gains from housing appreciation, one must first

31. *See id.*

32. *See* James W. Ainsworth Darnell, *Does It Take a Village? How Neighborhood Context Affects School Performance Across Racial Groups* (1999) (unpublished Ph.D. dissertation, The Ohio State University) (on file with author).

33. *See* April Pattavina, *The Influence of Community Violence on Child Development in an Urban Setting*, 7 RES. POL. & SOC. 163, 163-82 (1999).

34. *See* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH AND SOCIAL POLICY IN AMERICA 74 (1999).

35. *See* Douglas S. Massey & Kumiko Shibuya, *Unraveling the Tangle of Pathology: The Effect of Spatially Concentrated Joblessness on the Well-Being of African Americans*, 24 SOC. SCI. RES. 352, 352-66 (1995).

36. *See* James R. Elliot, *Social Isolation and Labor Market Insulation: Network and Neighborhood Effects on Less-Educated Urban Workers*, 40 SOC. Q. 199, 199-216 (1999).

37. *See* Stuart A. Gabriel & Stuart S. Rosenthal, *Commutes, Neighborhood Effects, and Earnings: An Analysis of Racial Discrimination and Compensating Differentials*, 40 J. URB. ECON. 61, 61-83 (1996).

38. CONLEY, *supra* note 34, at 102 fig. 4.5 (alteration in original).

39. Thomas A. DiPrete, *Discrimination, Choice, and Group Inequality: A Discussion of How Allocative and Choice-Based Processes Complicate the Standard Decomposition*, 22 SOC. SCI. RES. 415, 415-40 (1993).

40. *See* Thomas M. Holloway, *The Role of Homeownership and Home Price Appreciation in the Accumulation and Distribution of Household Sector Wealth*, 26 BUS. ECON. 38 (1991); Oliver and Shapiro estimate that homes account for about forty-three percent of whites assets and sixty-three percent of black's assets. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUITY 106 (1997); *see also* Miriam

own a house. Though home ownership rates are at an all time high, whites are still far more likely to be homeowners than other groups. In 1998, 72.6% of whites owned their own homes, as compared to only 46.1% of blacks and 44.7% of Hispanics. Just over half of persons of "other races," 53.7%, owned homes, a category that includes Asians and Native Americans.⁴¹ Even among homeowners, however, African Americans consistently own homes of lower value, regardless of their socioeconomic status and household structure.⁴² As discussed, Oliver and Shapiro estimate that the current generation of African Americans lost out on \$82 billion in wealth accumulation through home ownership, with lack of appreciation in housing value accounting for seventy-one percent (\$58 billion) of that loss.⁴³ Though no studies specifically make such estimates for Hispanics or Asians, it is likely that they lose less than blacks but do not gain as much as whites.

This author's own current work is looking at housing appreciation at the neighborhood level. If we consider the median value of a home in the neighborhood to reflect both structural value (bricks and mortar) and the location of the house with respect to schools, jobs, and other amenities, then by comparing housing values and housing value change in more and less segregated neighborhoods, we can begin to see the effect of segregation on housing values. Together with several of my colleagues, I have been seeking to understand this phenomenon in Washington, D.C. Though the work is not yet complete, our initial findings reveal that both blacks and whites are penalized for living in neighborhoods that are more heavily black. The housing values shown in Table Five reveal a substantial penalty associated with living in predominately black neighborhoods, regardless of one's race.⁴⁴ Changes in housing values (appreciation) from 1980-1990 (data not shown) reveal a similar pattern. These results corroborate the conclusions of David Harris, who found that units lose approximately sixteen percent of their value when neighborhood composition increases from less than ten percent black to between ten percent and sixty percent black, and they lose forty-six percent of their value if the neighborhood's black population rises above sixty percent.⁴⁵ These results vary significantly by region, following the same pattern as the declines in segregation discussed above.

Western housing loses no more than 33% of its value when located in neighborhoods that are more than 10% black. By contrast, reductions in

Wasserman, *Appreciating the House*, 8 REG. REV. 20 (1998).

41. See George S. Masnick et al., *A Critical Look at Rising Home Ownership Rates in the United States Since 1994* (unpublished working paper) (on file with author).

42. Hayward Derrick Horton & Melvin E. Thomas, *Race, Class, and Family Structure: Differences in Housing Values for Black and White Homeowners*, 68 SOC. INQ. 114, 114-36 (1998).

43. See OLIVER & SHAPIRO, *supra* note 40, at 151.

44. See Table 5, *infra*.

45. See David R. Harris, "Property Values Drop When Blacks Move In, Because . . .": *Racial and Socioeconomic Determinants of Neighborhood Desirability*, 64 AM. SOC. REV. 461, 461-79 (1999).

annual costs are as much as 40% in the South, 52% in the Midwest and 70% in the Northeast for dwellings located in neighborhoods that are more than 10% black.⁴⁶

In one sense, it is important not to overinterpret these data by assigning a causal role to racial composition. As Harris shows, the effects of a neighborhood's black population disappear when one controls for poverty, unemployment, and lack of college education, indicating that the association between housing value and black population reflects the fact that people prefer affluent, well-educated neighbors; these traits that are currently more prevalent in the white than black population.⁴⁷ At the same time, the implied financial losses to individuals remain unchanged, regardless of whether people are responding to the race or the socioeconomic status of their potential neighbors.

Another way to accumulate wealth is through self employment and business ownership. A recent article by Douglas Massey and Mary Fischer documents the effects of segregation on the probability of business ownership.⁴⁸ They found that, to a point, segregation helps by providing a concentrated consumer base, but, if it gets too high, it becomes a hindrance; this is the situation in which African Americans, more than Asians or Hispanics, are likely to find themselves.⁴⁹ Although there is no available research that documents the specific effects of segregation on business appreciation, the lower net proceeds of those serving segregated markets strongly suggests the negative impact of segregation because the value of a business is a function of its earnings. When considered in conjunction with the lower disposable income of many non-white groups, it is hardly surprising that segregation limits the ability to establish businesses and accumulate wealth through business ownership.

Finally, segregation limits people's ability to acquire wealth and property via inheritance and inter-vivos transfers. Research shows that whites are much more likely to receive parental help with the down payment on a home than blacks.⁵⁰ To the extent that segregation blocks pathways to human capital accumulation and appreciation of assets, logic dictates that there are fewer assets to be inherited by the next generation. Living in segregated neighborhoods thus constrains a group's average class standing, which, in turn, limits estate size. Both of these phenomena are both reflected in the lower net worth of the most segregated group, African Americans.⁵¹

46. *Id.* at 472.

47. *See id.*

48. *See* Mary J. Fischer & Douglas S. Massey, *Residential Segregation and Ethnic Enterprise in U.S. Metropolitan Areas*, 47 SOC. PROBS. 408, 408-24 (2000).

49. *See id.*

50. *See* Paul L. Menchik & Nancy Ammon Jianakoplos, *Black-White Wealth Inequality: Is Inheritance the Reason?*, 35 ECON. INQ. 428, 428-42 (1997); Moira Munro, *Housing Wealth and Inheritance* 17 J. SOC. POL'Y 417 (1988).

51. *See* Kenneth C. Land & Stephen T. Russell, *Wealth Accumulation Across the Adult Life Course: Stability and Change in Sociodemographic Covariate Structures of Net Worth Data in*

In short, there are a wide variety of mechanisms through which segregated neighborhoods can negatively affect people's ability to acquire wealth and property. All of these are properly thought of as characteristics of the neighborhood and, as Kathleen Engel has pointed out, people who live in segregated neighborhoods are deprived of intangible community benefits, a fact that traditional remedies for housing discrimination do not address.⁵² Though this discussion has touched on several mechanisms by which segregation impacts wealth accumulation, more research into the details of how they work and the magnitude of their effects is needed.

CONCLUSION

Current trends in segregation and how it links wealth and property accumulation does not bode well for the reduction of inequality. Segregated persons of color experience negative effects from their segregation even if they are able, at an individual or family level, to avoid the crime, drugs, and other social problems too often found in the most segregated neighborhoods. Lower levels of segregation in multi-ethnic metropolitan areas and increasing neighborhood integration (though with small proportions of minorities) in many metropolitan areas, which will no doubt be prominent findings from the 2000 Census, offer only small grounds for optimism, because they will affect only a small proportion of the metropolitan black, Hispanic and Asian populations. Those who remain in highly segregated cities and highly segregated neighborhoods will continue to lose with respect to their ability to acquire wealth and property, their children's acquisition of needed human capital to achieve high earnings, and the appreciation of the investments which comprise their estates. Until neighborhood racial composition, particularly black racial composition, ceases to signal low demand for housing and amenities in the larger housing market, all who live in segregated neighborhoods, regardless of their race, will be restricted in their access to the means of property and wealth accumulation. However, because by definition, those who live in highly segregated non-white neighborhoods are not white, the burden of segregation will continue to fall not on whites, but on non-whites.

the Survey of Income and Program Participation, 1984-1991, 25 SOC. SCI. RES. 423, 423-62 (1996).

52. See Kathleen C. Engel, *Moving up the Residential Hierarchy: A New Remedy for an Old Injury Arising from Housing Discrimination*, 77 WASH. U. L.Q. 1153 (1999).

Table 1. Trends in the Residential Segregation of African Americans, Hispanics and Asians in Five Major Metropolitan Areas, 1970-1990.

Blacks	1970	1980	1990
Chicago	91.9	87.8	85.8
Los Angeles	91.0	81.1	73.1
Miami	85.1	77.8	71.8
New York	81.0	82.0	82.2
San Francisco	80.1	71.7	66.8
Hispanics			
Chicago	58.4	63.5	63.2
Los Angeles	46.8	57.0	61.1
Miami	50.4	51.9	50.3
New York	64.9	65.6	65.8
San Francisco	34.7	40.2	49.8
Asians			
Chicago	55.8	43.9	43.2
Los Angeles	53.1	43.1	46.3
Miami	39.2	29.8	26.3
New York	56.1	48.1	48.4
San Francisco	48.6	44.4	38.5

Table 2. Segregation of Blacks, Hispanics, and Asians by Income and by Central City and Suburbs, 1990.

Panel A			
Average	Black	Hispanic	Asian
\$0-14,999	72.3	58.1	59.8
\$15-34,999	65.7	50.1	49.7
\$35-49,999	64.7	46.3	49.0
\$50+	62.2	39.7	44.2
Panel B			
Central City			
\$0-14,999	74.5	59.5	57.0
\$15-34,999	68.1	51.4	48.0
\$35-49,999	68.1	47.2	48.8
\$50+	67.5	40.6	45.0
Panel C			
Suburbs			
\$0-14,999	64.3	53.3	58.7
\$15-34,999	58.9	46.6	48.5
\$35-49,999	59.1	44.3	48.1
\$50+	56.7	38.2	43.2

Table 3. Percentage of the Population Foreign-Born in 1990 and 1997 and Percentage of Immigrants Admitted in 1997 Choosing Metropolitan Area as Intended Residence.

Metropolitan Area	% Foreign Born in 1990	% Foreign Born in 1997	Intended Residence in 1997
Chicago	11.3	13.0	4.4
Los Angeles	27.1	30.5	7.8
Miami	33.6	38.6	5.7
New York	19.6	22.8	13.5
San Francisco	20.0	20.8	2.1

Table 4. Estimated Percentage Increase in Metropolitan Populations, 1990-99.

Slow-Growing	% Increase	Immigrant Receiving	% Increase
Buffalo	-4.0	Chicago	+7.8
Cleveland	+1.9	Los Angeles	+10.7
Detroit	+5.4	Miami	+16.2
Milwaukee	+2.6	New York	+3.2
Pittsburgh	-2.7	San Francisco	+9.5

Table 5. Average 1990 Median Home Value (in thousands) of Homes Owned by Blacks and Whites by Percentage of Blacks in Neighborhood, 1980, Washington, D.C. Metropolitan Area.

	<5%	5-9%	10-19%	20-29%	30-39%	40-49%	50-59%	60-69%	70-79%	80-89%	90-100%
White	\$248	172	176	138	153	153	126	115	95	91	74
Black	\$219	146	145	131	120	109	118	109	96	90	83

PROPERTY, WEALTH, INEQUALITY AND HUMAN RIGHTS: A FORMULA FOR REFORM

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SHELBI D. DAY**

[A]ll men are created equal . . . endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.¹

Disparities in wealth between blacks and whites are not a product of haphazard events, inborn traits, isolated incidents or solely contemporary individual accomplishments. Rather, wealth inequality has been structured over many generations through the same systemic barriers that have hampered blacks throughout their history in American society: slavery, Jim Crow, so-called *de jure* discrimination, and institutionalized racism.²

In Germany they first came for the Communists,
and I didn't speak up because I wasn't a Communist.
Then they came for the Jews,
and I didn't speak up because I wasn't a Jew.
Then they came for the trade unionists,
and I didn't speak up because I wasn't a trade unionist.
Then they came for the Catholics,
and I didn't speak up because I was a Protestant.
Then they came for me—
and by that time no one was left to speak up.³

* Levin, Mabie & Levin Professor of Law, University of Florida Levin College of Law. Many thanks to Florence Roisman for organizing the very exciting conference for which the original comments upon which this paper is based were prepared and for her comments on earlier drafts of this Article. Much appreciation to Stuart Deutsch, Dean of Rutgers—Newark Law School, Chair of the AALS Conference on Property, Wealth and Inequality for inviting me to participate in a most exciting and challenging forum. Lastly, *mil gracias* to my coauthor, Shelbi Day, whose research, writing, and editing work is outstanding, and without that work this project could not have become a reality.

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 12-13 (1995).

3. Pastor Martin Niemöller, *Serendipity*, available at <http://serendipity.magnet.ch/cda/niemoll.html> (last modified Dec. 24, 1997). The following is Pastor Niemöller's exact statement: When Hitler attacked the Jews I was not a Jew, therefore I was not concerned. And when Hitler attacked the Catholics, I was not a Catholic, and therefore, I was not concerned. And when Hitler attacked the unions and the industrialists, I was not a

INTRODUCTION

This essay scrutinizes the persistence of inequality in the United States through a human rights lens and grapples with the troubling disparities unearthed by two works: *American Apartheid: Segregation and the Making of the Underclass*⁴ and *Black Wealth/White Wealth: A New Perspective on Racial Inequality*.⁵ These two highly enlightening and, simultaneously, deeply troubling and depressing books elucidate the myriad locations at which inequalities persist and the historical, social, psychological, and legal foundations of, and explications for, such disparities in the African American community.⁶

This work proposes a human rights paradigm that provides a methodology to analyze, deconstruct and unravel the existing systematic inequalities in Black/white wealth. First, we examine the historical relationship between Blacks and whites in the United States in the context of property, wealth, and economics. Then, in Part II, we reveal the disturbing reality that not much has changed. Next, we make a two-part suggestion of how to ameliorate, or at least begin to remedy, current economic inequalities by proposing the application of a human rights paradigm of economic discrimination as violence. Finally, we analyze the role of republican liberalism in Black/white economic inequality and reveal how, despite its equality-based dialect, it has translated into a model that has enabled inequality.

I. HISTORY OF INEQUALITY OF BLACKS AND WHITES IN THE U.S.

The history of slavery—and the resultant unique oppression of Blacks in the United States—dates to well before the creation of this nation.⁷ Pinpointing the

member of the unions and I was not concerned. Then Hitler attacked me and the Protestant church—and there was nobody left to be concerned.

114 CONG. REC. 31,636 (1968) (statement of German anti-Nazi activist Pastor Martin Niemöller).

4. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE AMERICAN UNDERCLASS* (1993).

5. OLIVER & SHAPIRO, *supra* note 2.

6. As suggested by Kenneth Nunn, we use “Black” and “African American” interchangeably to refer to American citizens who are of African decent. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 64 n.7 (1993) (explaining that “‘Black’ denotes racial and cultural identity rather than mere physical appearance and is therefore capitalized. The word ‘white,’ on the other hand, is not capitalized because it is not ordinarily used in this sense”). See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1998), reprinted in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 103 (Kimberlé Crenshaw et al. eds., 1995).

7. See JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 91-92 (2000); see also JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 40-41 (2000) (explaining that the first Africans were brought into the

actual *beginning* of slavery and racism is a difficult task.⁸ However, in the United States, slavery quickly developed into a regular institution⁹ that became foundational to the creation and even the industrialization of the United States. In fact, what a noted sociologist has called the “racist foundation”¹⁰ of the United States was laid in 1787 at the Constitutional Convention at which many of the forefathers espousing freedom were, ironically, themselves slave-owners.¹¹ Once this foundation was laid, the decimation of Black persons’ humanity flowed through the institution of slavery. Not only were slaves routinely tortured and exploited, they were only chattel, personal property to be bought and sold at the master’s whim without regard to family or other human ties.¹²

Thus began the United States’ long history of violence¹³ against Blacks—a history that has systematically denied not only civil, social, and political rights, but also economic and cultural rights.¹⁴ The institutionalization of slavery into the U.S. system marked “the normal labor relation of blacks to whites in the New

English colonies in 1619 by a Dutch ship and were used as indentured servants, wholly unequal to the English colonists and that by the 1670s colonial laws legitimized and protected slavery).

8. This is difficult because slavery began well before the creation of the New World and was “institutionalized” in this country at the time of the Constitutional Convention. However, slavery was in existence in other parts of the world and was evident in many different forms varied by culture and time. See FEAGIN, *supra* note 7, at 40. See generally Gil Gott, *Moral Imperialism, Imperial Humanitarianism: History of an Arrested Dialectic*, in MORAL IMPERIALISM A CRITICAL ANTHOLOGY (forthcoming 2001) (on file with authors) (providing a brief history of slavery).

9. See KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY: CASES AND MATERIALS 245 (2d ed. 1996) (stating “[n]ineteenth-century lawmakers invoked race to define personal status. Slavery, for example, attached exclusively to black people” and continued throughout history to subordinate blacks).

10. See FEAGIN, *supra* note 7, at 14 (arguing that as early as the Constitutional Convention, the foundation of the United States was fundamentally flawed: “[t]he framers reinforced and legitimated a system of racist oppression that they thought would ensure that whites, especially white men of means, would rule for centuries to come”). See generally DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1989).

11. See FEAGIN, *supra* note 7, at 9-14, 41 (explaining that slavery was a central issue in the debates as is evident from historical notes on the content of the debates and suggesting that at least half of the signatories to the Declaration of Independence were slave-owners or were involved in the slave trade).

12. See *id.* at 22 (stating that Blacks were ripped from their homeland, sold as slaves, tortured for insubordination, denied education, separated from their families, subjected to sexual violence, forced to work with no benefit, denied education, and treated as property to be bought and sold at the slave owners’ discretion). See HALL ET AL., *supra* note 9, at 190 (explaining that slaves were property—bought and sold, exploited by their masters, and controlled by the states; however, dually, they were human—subject to criminal prosecution).

13. “Violence,” as we regard it, is not merely physical acts. Violence comes in many forms. See *infra* Part III.B. Compare with Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Re/conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607 (1997).

14. See FEAGIN, *supra* note 7, at 16-17.

World.”¹⁵ The transition in America from a period of legalized slavery to a period of freedom—deemed generally the “Reconstruction” period—marked not only a shift in location of former slaves from inhuman to human beings,¹⁶ but also marked the related struggle of Blacks in the United States to procure entitlement to the trappings of humanity in a liberal state—freedom, equality, and property ownership.

Out of the post-Civil War/Reconstruction period came the historically significant Reconstruction Amendments:¹⁷ the Thirteenth Amendment abolishing slavery;¹⁸ the Fourteenth Amendment prohibiting States of the Union from depriving persons—a group that included former slaves—from life, liberty or property without due process of law and mandating States to grant all persons within their jurisdiction equal protection of the laws;¹⁹ and the Fifteenth Amendment enfranchising all male citizens regardless of race, color, or prior slavery status.²⁰

Although with passage of these Constitutional Amendments Blacks were no longer slaves, they were still far from equal and were just beginning a long journey—yet to be completed—to attain full rights and freedoms as United States citizens.²¹ If we could freeze-frame society at that moment and measure the existing wealth disparities, the inequalities that persist to the present day would not have been difficult to prognosticate. Slaves’ labor was not compensated; the fruits therefrom were not theirs to keep.²² Slaves were regarded as property and owned very little, if any, property of their own.²³ So, after years of history on this land, under prior existing circumstances, there was no possibility for Blacks

15. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1992-PRESENT* (1995), in PEREA ET AL., *supra* note 7, at 92.

16. See OLIVER & SHAPIRO, *supra* note 2, at 13. “The close of the Civil War transformed four million former slaves from chattel to freedmen.” *Id.*

17. See PEREA ET AL., *supra* note 7, at 132. “The fact that these amendments could not have been adopted under any other circumstances, or at any other time, before or since, may suggest the crucial importance of the Reconstruction era in American history.” *Id.* (quoting RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS 11-12 (Kenneth Stampp & Leon F. Litwack eds., 1969)).

18. U.S. CONST. amend. XIII (abolishing slavery and involuntary servitude).

19. U.S. CONST. amend. XIV, § 1 (mandating that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

20. See U.S. CONST. amend. XV (requiring that no U.S. citizen be denied the right to vote “on account of race, color, or previous condition of servitude”). Significantly this amendment enfranchised only men of color, women—both of color and white alike—were denied the right to vote until 1920 when the Nineteenth Amendment was passed. See U.S. CONST. amend. XIX.

21. See HALL ET AL., *supra* note 9, at 246 (explaining “[t]he amendments were only partially successful in creating substantive equality for black people”).

22. See FEAGIN, *supra* note 7, at 49.

23. See *id.* at 49 (asserting that slaves were denied most human rights and liberties and were denied property ownership as well as the right to contract giving them no opportunity to accumulate wealth).

to accumulate coveted wealth. With this reality, what awaited the newly freed peoples was the persistence of injustice and racism in the country that they had helped build and grow.

Initially, upon the abolition of slavery, it seemed that massive land distribution in the South would occur—land that was prosperous because of slave labor.²⁴ Such redistribution *could* have afforded former slaves a just and significant start in this country and an opportunity to start on a road towards equality. However, a legally mandated promotion of Black land-ownership did not occur until the passage of the Southern Homestead Act of 1866, which provided for the inclusion of former slaves in a massive public land distribution.²⁵ However, as history would play out, it was in fact whites who overwhelmingly reaped the benefits of the Act with Blacks constituting fewer than a quarter of the land applicants.²⁶

Racism and discriminatory practices such as illegal fees, court challenges, court decisions, and unscrupulous land speculators impeded Blacks' abilities to obtain land ownership.²⁷ Thus, contrary to the expectations generated by the Homestead Act, the majority of Blacks did not become land owners.²⁸ Because land ownership is, and has always been, a primary source of wealth,²⁹ Blacks deprived of such ownership did not have an opportunity to start the wealth accumulation process and were overwhelmingly forced into poverty.

In addition to the lack of opportunity to progress economically, in the over seventy-five year period of slavery African Americans also lacked the opportunity to progress educationally and, in fact, were even prohibited from learning to read (oftentimes by law). These deprivations resulted in a society in which most Blacks were illiterate.³⁰ Consequently, Blacks went from legal slavery to institutionalized oppression—a condition that would be perpetuated in the normative realities of disparate locations with respect to property ownership specifically and economics generally. To be sure, social and legal policy initiatives throughout time have maintained the schisms between Blacks and whites.

24. *See id.* at 15 (explaining that the whites, especially ruling/prominent whites, enjoyed the wealth and leisure brought to them by the exploitation of slaves); HALLET AL., *supra* note 9, at 189-90 (stating that slavery was an integral part of the economy in the South).

25. *See* OLIVER & SHAPIRO, *supra* note 2, at 14 (explaining that this homesteading effort to settle the West was administered by the Freedman's Bureau and gave substantial reason to believe that former "slaves would be transformed from farm laborers to yeomanry farmers").

26. *See id.* However, this Act did result in a quarter of black southern farmers owning their own farms by 1900. *See id.* at 15.

27. *See id.*

28. *See id.*

29. *See id.* at 2. "Wealth" is used to describe the accumulation of inheritable property—particularly land and homestead, while "income" pertains to fluid assets such as money and other intangibles. *See id.*

30. *See* FEAGIN, *supra* note 7, at 49 (explaining that slaves in the United States were "generally forbidden by law to read or write").

Despite widespread racism and discrimination, segregation was not commonplace in southern or northern cities until the early 1900s.³¹ At that time, manifestations of racial discrimination were more evident in employment practices than in housing patterns.³² Indeed, high levels of Black-white integration were the norm,³³ and neighborhoods reflected class rather than race-based stratifications. Accordingly, persons from the same socio-economic classes regularly interacted—both socially and in business—with no real regard to skin color.³⁴ This was especially true among the wealthiest class.³⁵

However, the landscape was different in the rural South, where, at that time, the overwhelming majority of Blacks still lived. In the rural South, Blacks were exploited under the share-cropping system created by white-landowners as the legal alternative to slavery.³⁶ During this period, the Jim Crow system of servitude³⁷ created an environment of such widespread oppression and subordination of Blacks, that residential segregation was unnecessary to create second-class status.³⁸ Therefore, residential segregation evolved at a much slower pace in the South than in the North.³⁹

Nevertheless, the Twentieth Century brought substantial migration of Blacks from the rural South to northern cities, a migration that resulted in the advent of highly segregated, all-Black neighborhoods.⁴⁰ This trend was motivated by well-defined institutional, social, political, and economic forces.⁴¹ Migration of Blacks from the rural South to large metropolitan areas was largely the result of industrialization in the United States, a development that created jobs for southern Blacks.⁴²

Particularly in the large cities of the North, industrialization itself changed the face of the urban environment—a phenomenon that paved the way to

31. See MASSEY & DENTON, *supra* note 4, at 17.

32. See *id.* at 20, 29.

33. See *id.* at 20 (reporting that Blacks rarely comprised more than thirty percent of the total residents in any given urban neighborhood).

34. See *id.* at 17-18 (explaining that Blacks shared a common culture with whites, interacted with whites on a regular basis, and often, especially leading African American citizens, maintained "relationships of considerable trust, respect, and friendship with whites of similar social standing").

35. See *id.*

36. See *id.* at 18.

37. See PEREA ET AL., *supra* note 7, at 141-42. The Jim Crow era replaced slavery and institutionalized discrimination and routine oppression of Blacks in the South. This was due to the attitudes and efforts of whites to enact a series of segregation laws and establish institutionalized discrimination against Blacks. Free Blacks in the South were faced with restrictions and violations of their most basic freedoms, i.e., to assemble, travel, and work. See *id.*

38. See MASSEY & DENTON, *supra* note 4, at 26, 40-41.

39. See *id.* at 26, 40.

40. See *id.* at 18, 26, 40.

41. See *id.* at 10, 18.

42. See *id.* at 26-42.

segregation.⁴³ Industrialization's shift from small shops to large factories created a need for a large number of unskilled laborers who were generally housed in clustered apartments and row houses that were constructed near the industrial districts to house the flourishing work force.⁴⁴ Hence, these conditions signaled the beginning of a downtown core/urban community in the United States. Blacks were sought out—in large numbers—to fill these unskilled labor positions when European immigration slowed,⁴⁵ when union workers were on strike (as strike-breakers),⁴⁶ and when industrial productivity skyrocketed during WWI.⁴⁷ These large numbers of persons were then clustered in the high-density model of housing that evolved into what we now know as the “inner city.”

By the beginning of WWII, this South to North migration laid the foundation for the modern-day “ghettos.”⁴⁸ In fact, WWII brought a rise in industry and the need for unskilled labor soared; subsequently, Black migration to northern cities flourished.⁴⁹ As the population of Blacks steadily increased, the reaction against it culminated.⁵⁰ Predicting what are now viewed as “tipping points,” northern newspapers began printing racial slurs and sensationalized incidents of violence.⁵¹ Indeed, race riots struck major cities, and the incidence of violence escalated.⁵² As a result, white racial views hardened, and racism became prevalent among whites.⁵³ At that time, whites demanded school segregation and forced a color-line in residential housing, creating eventual racialized residential segregation.⁵⁴ Segregation, then, was the result of white desire for separation of the races as well as Black fear and mistrust of whites—forcing Blacks into social/racial isolation.

Thus, racial segregation did not result from consequential migration or Black housing preferences.⁵⁵ In reality, upper and middle class Blacks “complained

43. *See id.* at 26.

44. *See id.*

45. *See id.* at 27-28.

46. *See id.* at 28. “Being denied access to the benefits of white unions, blacks had little to lose from crossing picket lines, thereby setting off a cycle of ongoing mutual hostility and distrust between black and white workers.” *Id.*

47. *See id.* at 28-29 (explaining that the outbreak of WWI in 1914 “increased the demand for U.S. industrial production and cut off the flow of European immigrants, northern factories’ traditional source of labor. In response, employers began a spirited recruitment of blacks from the rural south”).

48. *See id.* at 31. “Ghetto” refers “only to the racial make-up of a neighborhood” overwhelmingly composed of Blacks. *Id.* at 18.

49. *See id.* at 30.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.* (stating that, in the eyes of whites, Blacks belonged in neighborhoods with other Blacks, regardless of socioeconomic standing, and the color line grew increasingly strong).

55. *See id.* at 33.

bitterly and loudly about their increasing confinement within crowded, dilapidated neighborhoods inhabited by people well below their social and economic status.”⁵⁶ However, whites employed tactics including the use of physical violence to keep middle class Blacks out of “white” neighborhoods and force them to remain in the “ghetto.”⁵⁷ For example, neighborhood “improvement associations,” designed to prevent Black entry into white neighborhoods and maintain the color line were a common organizational strategy used to promote and foster racial segregation.⁵⁸ Among other things, neighborhood “improvement associations” implemented racially restrictive covenants and deeds to ensure “racial homogeneity” in residential neighborhoods.⁵⁹

During and after WWII, discrimination by realtors and lenders maintained segregation through the use of manipulation and racist policy and procedures. After WWII, the need for housing skyrocketed with the baby boom.⁶⁰ During this increase in a need for housing in the “ghetto” areas, realtors made calculated efforts to create “white flight” from areas bordering “ghettos” to maintain segregation and create more housing for Blacks.⁶¹ Realtors also took advantage of Blacks through dishonest lending practices, often setting them up for failure so foreclosure and resale would result.⁶² Additionally, banks and lenders exploited Black borrowers by charging high interest rates and routinely denying Blacks loans to which their white counterparts had access.⁶³

From the 1930s to the 1960s the government supported and encouraged suburban growth through its use of taxation, transportation, and housing policies.⁶⁴ During the suburbanization of the major metropolitan areas in the

56. *Id.*

57. *See id.* at 33-34.

The pattern typically began with threatening letters, personal harassment, and warnings of dire consequences to follow. Sometimes whites, through their churches, realtors, or neighborhood organizations, would take up a collection and offer to bury the black homeowner out, hinting of less civilized inducements to follow if the offer was refused.

Id. at 34.

58. *Id.* at 35. *See also* RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* 443-45 (2d ed. 1999).

59. *MASSEY & DENTON*, *supra* note 4, at 36. These practices were eventually declared illegal. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948); CHUSED, *supra* note 58, at 443-55; JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 621, 638-42 (2d ed. 1997).

60. *See MASSEY & DENTON*, *supra* note 4, at 44.

61. *See id.* at 37 (defining these methods of opening up neighborhoods to African-American entry for the purpose of reaping the profits as “blockbusting”).

62. *See id.* at 36-39. Significantly, these practices are still flourishing today.

63. *See id.* at 38.

64. *See OLIVER & SHAPIRO*, *supra* note 2, at 16 (explaining that taxation policy gave companies tax incentives for relocating to the suburbs; transportation policy encouraged mass-production of vehicles, facilitated construction of highways and freeways, and subsidized cheap fuel; housing programs/policies enabled construction and purchase of single-family homes); *see*

United States, discrimination kept Blacks from entering the housing market on the same terms and with the same loans as whites. Middle class Blacks faced barriers, such as discriminatory real estate, banking and FHA practices that were intentionally and systematically constructed by whites to keep Blacks from escaping the ghetto.⁶⁵

Despite the success of these practices and policies in the creation of a suburban United States, Blacks, because of systematic discrimination, were largely denied access to and were unable to take advantage of this accumulation of wealth quintessentially represented by "the suburban tract home."⁶⁶ Not only did the realtors and lenders engage in discriminatory practices, the trend was continued and indeed institutionalized when the Federal Housing Administration (FHA) was established by the U.S. government in 1934.⁶⁷ With the FHA came the modern mortgage system which allowed individual families to purchase homes with a small down payment, a low interest rate, and a long payback period.⁶⁸ Under the FHA programs, a house payment was generally cheaper than rent.⁶⁹

However, Blacks were routinely denied access to FHA programs because of institutional discriminatory practices. For instance, to ensure "neighborhood stability," the FHA's published and mandated practices facilitated and continued

also MASSEY & DENTON, *supra* note 4, at 44 (explaining that "[i]n making this transition from urban to suburban life, middle-class whites demanded and got massive federal investments in highway construction that permitted rapid movement to and from central cities by car. The surging demand for automobiles accelerated economic growth and contributed to the emergence of a new, decentralized spatial order").

65. See MASSEY & DENTON, *supra* note 4, at 57-59; OLIVER & SHAPIRO, *supra* note 2, at 15-18.

66. OLIVER & SHAPIRO, *supra* note 2, at 16-17 (illustrating that government agents routinely factored in racial composition of a household or community and then placed Blacks in the lowest category as undesirable for benefits/assistance); see also KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 195-203 (1985) (explaining that the Home Owners Loan Corporation (HOLC), which was created to refinance mortgages in danger of default or foreclosure, and appraising properties and entire communities for individual and group loans, systematically and almost completely eliminated Black access to government loans/benefits and access to suburban opportunities).

67. See MASSEY & DENTON, *supra* note 4, at 52 (stating that the FHA loan program was created by the National Housing Act of 1937); OLIVER & SHAPIRO, *supra* note 2, at 17 (explaining that the Federal Housing Administration (FHA) was implemented to "bolster the economy and increase employment by aiding the ailing construction industry). See generally JACKSON, *supra* note 66.

68. See OLIVER & SHAPIRO, *supra* note 2, at 17; see also MASSEY & DENTON, *supra* note 4, at 52-53 (explaining that the FHA loan program in conjunction with a similar and equally discriminatory program—the Veterans Administration Program—reshaped the residential housing market and pumped millions of dollars into the housing industry at this time).

69. See OLIVER & SHAPIRO, *supra* note 2, at 17; see also MASSEY & DENTON, *supra* note 4, at 53.

racial segregation by using discriminatory rating systems, racially restrictive covenants, and subdivision regulations.⁷⁰ In fact, overt discrimination but use of restrictive covenants lasted until 1948 when the U.S. Supreme Court outlawed the use of racially restrictive covenants in *Shelley v. Kraemer*.⁷¹ Nonetheless, through persistent “redlining”⁷² and continued discriminatory practices, Blacks—as a class with limited resources because of the discussed historical development—had limited access to FHA benefits.⁷³ Consequently, the lack of access to suburbia forced Blacks to stay in inner-cities and ghettos.⁷⁴ This barrier to suburbia effectively “locked out” Blacks from perhaps the greatest wealth accumulation period/opportunity in U.S. history.⁷⁵

In addition to discriminatory housing practices, by the beginning of the 1950s, most of the important public and private services and facilities were highly racially segregated.⁷⁶ Typical labor relations were discriminatory by practice, placing Blacks disproportionately in menial, low paying labor positions with little opportunity for advancement.⁷⁷ Further facilitating marginalization of Blacks was routine and oftentimes mandated school segregation—existing at all educational levels—from elementary to professional school.⁷⁸ A drastic change seemed to emerge during the 1950s to 1960s when the Civil Rights Movement swept across the nation, demanding equal treatment of Blacks.⁷⁹ The Civil

70. See OLIVER & SHAPIRO, *supra* note 2, at 18; see also MASSEY & DENTON, *supra* note 4, at 53-54.

71. 334 U.S. 1 (1948).

72. See BLACK'S LAW DICTIONARY 1283 (7th ed. 1999) (defining “redlining” as “[c]redit discrimination ([usually] unlawful discrimination) by a financial institution that refuses to make loans on properties in allegedly bad neighborhoods”).

73. See MASSEY & DENTON, *supra* note 4, at 54.

74. See *id.*; see also OLIVER & SHAPIRO, *supra* note 2, at 18.

75. MASSEY & DENTON, *supra* note 4, at 54 (stating the FHA discriminatory policies/practices resulted in the majority of FHA mortgages going to whites—with Blacks largely left out); OLIVER & SHAPIRO, *supra* note 2, at 18.

76. See DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 33-34, 46-47 (2d ed. 1998) (finding racially segregated facilities included hotels, buses, theaters and swimming pools); see also HALL ET AL., *supra* note 9, at 510 (discussing the segregated public toilets, schools, and theater seats in the South). Even under the best of circumstances, Blacks were not socially equal to whites, and in the nineteenth century “[i]n matters of public schooling, voting, and marrying, the legal order reflected an underlying social assumption that, for the most part, blacks were not to mix with whites.” *Id.* at 246.

77. See FARBER ET AL., *supra* note 76, at 34 (explaining that banks oftentimes would not lend money to Black-owned businesses and that businesses owned by whites typically hired Blacks for menial, low-paying jobs).

78. See *id.*

79. See PEREA ET AL., *supra* note 7, at 162-63 (listing a few of the notable achievements of the Civil Rights Movement: the Montgomery Alabama bus boycott and the direct challenge to segregation in Birmingham—both of which were planned and executed under the Southern Christian Leadership Conference spearheaded by Black leaders such as Martin Luther King, Jr.,

Rights Movement brought with it legislative achievements comparable to the Reconstruction Era and is often referred to as the “Second Reconstruction.”⁸⁰ However, just as in the Reconstruction Era, the attempts at equality proved to be, at best, inadequate to realize true equality.⁸¹

During these decades, racial practices in higher education were the first to be contested, and eventually discriminatory admissions practices were denounced by the Supreme Court.⁸² However, segregation in secondary education was a legal way of life until 1954, when the U.S. Supreme Court held in *Brown v. Board of Education*⁸³ that racial segregation was unconstitutional.⁸⁴ In fact, it was not until the 1960s that the government took action to prevent these discriminatory practices and policies in housing,⁸⁵ education⁸⁶ and employment.⁸⁷ Despite these efforts—and our entry into the twenty-first century—inequality persists.⁸⁸

II. THE PERSISTENCE OF INEQUALITY

After thoroughly researching and preparing the preceding section, we found this section unusually difficult to write. This is not because it is the most complex or because the information is difficult to come by; rather, the difficulty stems from the disheartening realization that not much has changed. Yes, times have changed, statutes have been enacted, and equality has been proclaimed, but

Fred Shuttlesworth, C.K. Steele, Ralph Abernathy, A. Phillip Randolph and Ella Baker—and organized student sit-ins at the university level advocating human rights, civil rights and political reform).

80. *Id.* at 164.

81. *See id.*

82. *See* FARBER ET AL., *supra* note 76, at 43-50. *See, e.g.,* Sweatt v. Painter, 339 U.S. 629 (1950) (ordering the University of Texas Law School to admit a Black student, recognizing the significance of intangible differences between “white” schools and “black” schools and reporting that segregation itself contributed to intangible differences); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948) (striking down Oklahoma’s failure to provide legal education opportunities to Blacks); Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337 (1938) (challenging the denial of a Black student to the University of Missouri School of Law and its subsequent creation of a Black law school, Lincoln University).

83. 347 U.S. 483 (1954).

84. *See* HALL ET AL., *supra* note 9, at 445 (explaining that “*Brown* was the culmination of case law that had been developing throughout the century” and stating that “[s]uccessful challenges to discrimination in political institutions, public education, and law enforcement laid the foundation for *Brown*”).

85. Fair Housing Act of 1968, 42 U.S.C. §§ 3600-3631 (1994).

86. Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-2000c(8) (1994).

87. Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1994). *See generally* JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 28-81 (3d ed. 1993).

88. *See* FEAGIN, *supra* note 7, at 23.

the reality is that the present is not simply reflective of, but disturbingly similar to the past. To be sure, the racism that plagued our history stubbornly persists.

The endurance of racism from past to present and the resultant condition of present day economic disparities between Blacks and whites can best be illustrated by an old metaphor about a fair race. As the story goes, there were two relay teams, both of identical overall ability and speed, notwithstanding individual variations among team members. Imagine then, that before the beginning of the race, ankle weights are placed on all of the members of one of the teams. The race commences with one team at an obvious disadvantage. Then, halfway through the race, in an attempt to even the playing field, we freeze all the action and take the weights off the disadvantaged team. We unfreeze and the race continues. The question then is whether taking off the weights is, alone, enough to make this a fair race. Was it, in the end, a just competition?⁸⁹ History has answered this for us; without affirmatively remedying the disparate historical treatment, the disadvantaged team will not catch up, the playing field does not magically become level.

After trudging through history and then examining the present state of equality (or better stated—persistent inequality), these weights seem to be an apt metaphor for the history of relations between Blacks and whites. The realities of inequality exist today, years after, in our imagining, we began believing that we had purged our collective complicities in this tragedy. We view the passage of the civil rights laws that prohibit discrimination as the proverbial “taking off” of the weights, and, because we all know that *de jure* disparate treatment is wrong, we condemn it. Therefore, we fantasize that racial inequality is a thing of the past.

However, the economic disparities between Blacks and whites are enough to tell us that “taking weights off” after years of oppression and marginalization does not equalize society; a mere law does not, because it cannot, take away the effects of years of inequality and subordination.⁹⁰ Although racism and its most harmful effects occurred during the early part of U.S. history, they endure today. Harms of the past are felt at present,⁹¹ exacerbated by the new, more sophisticated and nuanced trappings of bigotry that are inflicted on Blacks today. To make a bad situation worse, the impact falls largely upon those who are at the bottom of the socio-economic ladder, as “the accumulation of disadvantages . . . pass[es] from generation to generation.”⁹²

89. See LESTER C. THUROW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* 188 (1980).

90. See FEAGIN, *supra* note 7, at 23 (explaining that “[o]ver the many generations since the late 1600s . . . [Blacks] have usually been unable to build up the economic, educational, and cultural resources necessary to compete effectively with white individuals and the greater socioeconomic resources they typically enjoy”).

91. See *id.* (explicating that through a system of generational inheritance of “undeserved enrichment” by whites and “unjust impoverishment” by Blacks, our current system of unequal wealth and opportunity for Blacks has persisted).

92. See OLIVER & SHAPIRO, *supra* note 2, at 12 (quoting WILLIAM JULIUS WILSON, *THE*

Indeed, notwithstanding the Fair Housing Act of 1968 high levels of Black-white segregation continued to persist in large urban areas and in suburbia where the population of Blacks was far smaller than the presence of other groups.⁹³ *American Apartheid*⁹⁴ extensively examines the continued racial segregation in America and the resultant perpetuation of the Black “underclass” as a result of such segregation.

The book reveals how “racial segregation—and its characteristic institutional form, the [B]lack ghetto, are the key structural factors responsible for the perpetuation of [B]lack poverty in the United States.”⁹⁵ It then explains that “[r]esidential segregation is the principal organizational feature of American society that is responsible for the creation of the urban underclass.”⁹⁶ In fact, perpetual segregation has created the structural emergence of a “culture that devalues work, schooling, and marriage and that stresses attitudes and behaviors that are antithetical and often hostile to success in the larger economy.”⁹⁷ Of course, one could also speculate that the devaluation of work could be rooted in the fact that during slavery work was uncompensated and since then only marginally so. Similarly, any devaluation of education and marriage could be grounded on the reality of Blacks’ existence during slavery when they could not even be taught to read nor allowed to marry and form formal family units lest those units be disrupted upon the sale of a family member.

Thus, despite laws, social awareness, and even the Civil Rights Movement, segregation has continued and is still prevalent today.⁹⁸ Segregation in the past twenty-years has ensured that, despite attempts at equal opportunity in areas such as labor, employment, housing, and education, Blacks do not begin at nor progress on a playing field equal to that of whites. However, until the last decade, segregation has been largely ignored by policy makers, theorists, and scholars.⁹⁹

In the recent past, equal opportunity programs such as affirmative action and the prosperity among some middle-class Blacks created the misperception that racism is no longer a problem and equality no longer exists in employment, education, housing, and other relevant facets of life.¹⁰⁰ In fact, many middle-

TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987)).

93. See MASSEY & DENTON, *supra* note 4, at 10 (explaining that one third of the population of all Blacks in the United States was concentrated among sixteen large metropolitan areas).

94. See generally *id.*

95. *Id.* at 9. See also FEAGIN, *supra* note 7, at 24 (explaining that despite the “end of apartheid in the United States in the 1960s” racism and oppression have persisted—“often in violation of civil rights laws”).

96. MASSEY & DENTON, *supra* note 4, at 9.

97. See *id.* at 8.

98. See FEAGIN, *supra* note 7, at 23 (explaining that despite the successes of the Civil Rights Movement and desegregation era, civil rights laws are largely unenforced, and African Americans still face large-scale discrimination in employment, housing, and most other arenas in society).

99. See MASSEY & DENTON, *supra* note 4, at 3.

100. See PEREA ET AL., *supra* note 7, at 165.

class Blacks are often regarded as the success stories of these equality programs.¹⁰¹ In reality, however, middle-class Blacks face daily discrimination in the workplace and during routine encounters with their white counterparts.¹⁰² "Moreover, through institutionalized discrimination whites not only restrict individual mobility but also social, economic, and political mobility, to protect white privilege and power. This seems to be the underlying reason for institutionalized racism."¹⁰³

That is the perverse point of segregation; the entrenchment of a racial hierarchy of power and privilege. Segregation does not have to do with money, although money—or lack thereof—is certainly one of its manifestations. Segregation is entrenched across socio-economic strata. In Massey and Denton's words, "[r]esidential segregation is not a neutral fact; it systematically undermines the social and economic well-being of [B]lacks in the United States."¹⁰⁴ In their opinion, the power of the majority defines reality, its comfort levels constitute integration, and its vision designs desirability.

Other non-neutral facts in Black-white economic disparities in this country are underscored by *Black Wealth/White Wealth*.¹⁰⁵ This work unveils the complicity of the government in crafting disparity and perpetuating subordination that effectuates persistent inequality.¹⁰⁶ These other non-neutral facts systematically undermine the social and economic well-being of Blacks in society simply by ensuring an inability to catch up in the already heavily skewed race to equality.¹⁰⁷ This cycle perpetuates itself in the inner city where, despite an official end to *de jure* segregation, systemic poverty and poor educational opportunities keep Blacks entrapped in destitution at a disproportional rate.¹⁰⁸

101. See Joe R. Feagin & Melvin P. Sikes, *Living with Racism: The Black Middle-Class Experience*, in PEREA ET AL., *supra* note 7, at 165-70.

102. See *id.* at 166-70; see also ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1995).

103. *Id.* at 168.

104. MASSEY & DENTON *supra* note 4, at 2. See also Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199 (2001).

105. OLIVER & SHAPIRO, *supra* note 2.

106. See generally *id.*

107. See, e.g., KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* (1965) (arguing that the ghetto is an intentional creation—colonization of Blacks—by white society, specifically those in power, in an attempt to render and reinforce powerlessness on Blacks).

108. See OLIVER & SHAPIRO, *supra* note 2, at 11-12. The authors explain that:

many blacks have fallen by the wayside in their march toward economic equality. A growing number have not been able to take advantage of the opportunities now open to some. They suffer from educational deficiencies that make finding a foothold in an emerging technological economy near to impossible. Unable to move from deteriorated inner-city and older suburban communities, they entrust their children to school systems that are rarely able to provide them with the educational foundation they need to take the first steps up a racially skewed economic ladder. Trapped in communities of despair, they face increasing economic and social isolation from both their middle-class

To be sure, overall, there has been an increase in Black wealth. However, Blacks have continuously fallen further behind the wealth of whites—revealing continued inequality between the races.¹⁰⁹ Given the bleak progress made throughout the years, perhaps we ought to re-think our visions and strategies for eradicating racial inequalities. Conceivably, it is time to admit that our civil rights norms have not gone far enough, or at least that, in their application, they have not yielded the intended results. Indeed, if equality is to be attained, we must reconceptualize our approach to wealth disparities and continued economic marginalization of Blacks.

III. A PROPOSAL FOR A HUMAN RIGHTS PARADIGM TO ADDRESS RACIAL INEQUALITIES

After traveling through such a depressing, yet realistic, path of both the historical and persistent economically-based discrimination and oppression of Blacks, in this section we recommend two related proposals for the eradication of segregation, wealth disparity, and persistent inequality.¹¹⁰ First, we suggest the adoption of the international human rights paradigm and consider that civil and political rights are interdependent with and indivisible from social, cultural, and economic rights.¹¹¹ Our second suggestion recommends that society view economic and wealth disparities as violence.¹¹²

A. *The Indivisibility of Rights Paradigm*

Our first suggestion is that we adopt the international human rights paradigm—a paradigm much more generous than the United States' current constitutional structure—to view this scenario of inequality. This paradigm says human beings have rights *because* they are *human beings*. It is a proclamation of entitlement to full personhood for all people.

International human rights norms help because the framework itself encompasses the civil and political rights—fundamental first generation rights that we recognize in the United States' Bill of Rights—as well as social, cultural, and economic rights (rights not recognized in the U.S. system) as interrelated with and integral to the attainment of human dignity. Furthermore, this paradigm recognizes not only the rights of individuals, but also the rights of communities including the rights of minority communities that exist within majority societies such as Blacks in white Anglo-majority society. Ostensibly, unlike in United States domestic law, in the international human rights context, this panoply of

counterparts and white Americans.

Id.

109. *See id.* at 12.

110. This is a reconfiguration of the comments given at the AALS Conference on Property, Wealth, and Inequality 2001 Symposium; Berta Esperanza Hernández-Truyol, Comments at the AALS Conference on Property, Wealth, and Inequality (2001).

111. *See* discussion *infra* Part III.A.

112. *See* discussion *infra* Part III.B.

rights is recognized as indivisible and interdependent.

In its 1996 *Human Development Report*, the United Nations described economic needs and equality as equivalent to civil freedoms or rights.¹¹³ This is in stark contrast to the U.S. view that regards civil rights as “primary” human rights—and thus heavily protects them—while economic needs are regarded as having less value and import.¹¹⁴ The United Nations plainly stated that “[e]veryone should have access to these opportunities to participate in economic, social, cultural, and political life. They are a basic right.”¹¹⁵

Significantly, in the past few years, attention in the United States has begun to shift towards violations of economic and social rights.¹¹⁶ The importance of economic rights and the growing recognition of the need for U.S. adoption of these rights is becoming evident and is gaining momentum among leading NGOs, as well as some grass roots human rights organizations.¹¹⁷ For instance, in its recent publication reporting on “culture and impunity,” Human Rights Watch, a leading NGO in the International Human Rights regime, reported on “the American workplace” and how American economic rights fits into the scheme of Human Rights,” an arena not normally undertaken by the organization.¹¹⁸ In the United States, notwithstanding an increased push for the full affirmation of the economic and social rights that were recognized in the Universal Declaration on Human Rights¹¹⁹ (Universal Declaration), these rights remain relegated to “second-class status.”¹²⁰

The indivisibility and interdependence human rights paradigm is relatively young, having been first envisioned in 1947 when the authors of the Universal Declaration incorporated this “holistic vision of rights” into the human rights regime—extending beyond political and civil participation to economic, cultural and social development.¹²¹ Based on the premise that economic, social, cultural, and political rights are essential, the Universal Declaration asserted that

113. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT, 1996, at 86 (1996) [hereinafter U.N. HDR 1996]. “The opportunities that are vital in human life are of many different kinds These opportunities are of three broad types—economic, social and political [T]he three categories are closely interrelated, and expanding one type of opportunity often helps expand others.” *Id.*

114. See Eyal Press, *Human Right—The Next Step*, NATION, Dec. 25, 2000, at 13-14 (explaining that overwhelmingly the view of dominant Western policy-makers is that “issues like education, food, and housing have no place in the traditional pantheon of rights”).

115. U.N. HDR 1996, *supra* note 113, at 86.

116. See Press, *supra* note 114, at 14-18 (explaining that activists—both organized and grass roots human rights groups are starting to draw attention to economic and social rights violations in the United States).

117. See generally *id.*

118. *Id.*

119. Universal Declaration on Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 127, U.N. Doc. A/810 (1948).

120. See Press, *supra* note 114, at 13.

121. U.N. HDR 1996, *supra* note 113, at 86.

“[e]veryone . . . is entitled to . . . the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”¹²² It further suggested that all people are entitled to own property¹²³ and provided that “[n]o one shall be arbitrarily deprived of his property.”¹²⁴ Additionally, the Universal Declaration’s overall emphasis was that all people are entitled to equal rights regardless of race and often various classifications.¹²⁵ The States’ hope was that this Declaration would eventually become the foundation of one binding human rights convention.¹²⁶

Since this first comprehensive document, numerous international human rights conventions and declarations have recognized, included, and defined economic rights as inherent to human development and the true attainment of equality. This vision places social, economic, and cultural rights within the “primary” human rights conceptualization.

In 1965, states signed onto the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹²⁷ This document was motivated by the persistence of racial discrimination¹²⁸ still in existence and “by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,” proclaiming that “the existence of racial barriers is repugnant to the ideals of any human society.”¹²⁹ Thus, the aspiration of the convention was to “adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.”¹³⁰

In 1966, during consideration of the anticipated covenant to embrace the Universal Declaration’s aspirations, a North/South and East/West as well as a

122. Universal Declaration on Human Rights, *supra* note 119, at art. 22.

123. *See id.* at art. 17, 1.

124. *Id.* at art. 17, 2.

125. *Id.* at art. 2 (stating that there should be no distinction based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” in the entitlement to freedoms and rights).

126. *See generally* Berta Esperanza Hernández-Truyol & Sharon Elizabeth Rush, *Culture, Nationhood, and the Human Rights Ideal*, 33 U. MICH. J.L. REFORM 233 (2000).

127. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. TREATY DOC. NO. 95-2, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

128. *See id.* at part I, art. 1. The treaty defined “racial discrimination” as: any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

129. *Id.* at preamble.

130. *Id.*

capitalism/communism divide emerged.¹³¹ This divide resulted in the bifurcation of the unified system envisioned in the Declaration into two separate conventions: the International Covenant on Civil and Political Rights ("ICCPR")¹³² and the Covenant on Economic, Cultural, and Social Rights¹³³ ("Economic Covenant").¹³⁴ The United States ratified the ICCPR undertaking to "ensure . . . *all* individuals"¹³⁵ within its boundaries "the right to self-determination"¹³⁶ and "[b]y virtue of that right . . . they freely pursue their economic, social and cultural development."¹³⁷

Similarly, the Economic Covenant obligated States to honor economic and social rights.¹³⁸ The treaty recognized that economic, cultural, and social rights are indivisible and "derive from the inherent dignity of the human person."¹³⁹ Further, the Covenant reinforced that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."¹⁴⁰ Significant in this regard is the fact that the Economic Covenant includes the right to property.

131. See Berta Esperanza Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, in 1 *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 3 (Kelly D. Askin & Doreen M. Koenig eds., 1998).

132. International Covenant on Civil and Political Rights, Dec. 9, 1966, S. TREATY DOC. NO. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1979; ratified by the United States June 8, 1992) [hereinafter ICCPR].

133. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-2, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

134. See Hernández-Truyol & Rush, *supra* note 126, at 246.

135. ICCPR, *supra* note 132, at Part II, art. 2, 1 (emphasis added).

136. *Id.* at Part I, art. 1, 1.

137. *Id.*; see also *id.* at Part III, art. 22, 1 (determining that in pursuit of economic rights, "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests").

138. See generally ICESCR, *supra* note 133, at Part II, art. 2, 1. See also Press, *supra* note 114, at 16.

[T]he UN Committee on Economic, Social and Cultural Rights has issued a series of "General Comments" outlining the minimal obligations that all states are expected to fulfill. With regard to education, the committee calls on all governments to provide "a detailed plan of action for the progressive implementation" of "compulsory education free of charge for all," noting that if a state lacks the resources to furnish this basic human need, "the international community has a clear obligation to assist."

Id.

139. ICESCR, *supra* note 133, at preamble.

140. *Id.* See also *id.* at Part III, art. 7(a)(i), (ii), (b), (c) (recognizing the enjoyment and favorable conditions of work ensuring, at a minimum, fair wages, equal value and remuneration for work, and equal pay, safe and healthy working conditions, decent living for themselves and their families, equal opportunity in employment and promotion).

Additionally, reflecting the indivisibility of rights construct, the Economic Covenant emphasizes the need for education and equal opportunity within education in order for persons to fulfill overall well-being.¹⁴¹ Although the Economic Covenant created an ambitious template for economic equality and empowerment, the United States regrettably has never ratified it. Rather, Washington has persistently tried to prevent recognition of these rights in this and subsequent conventions.¹⁴²

Later, in 1986, the Declaration on the Right to Development (DRD or Development Declaration), reiterating the indivisible and interdependent nature of all human rights,¹⁴³ highlighted the right to pursue economic development.¹⁴⁴ Ultimately, the Development Declaration called for the elimination of racism,

141. See *id.* at Part III, art. 13, 1 (recognizing equal right to education; agreeing that education “shall be directed to the full development of the human personality and the sense of its dignity;” focusing on the respect for human rights and fundamental freedoms—asserting that economic, political, civil, social, and cultural rights are interdependent and indivisible; and promoting the “understanding, tolerance and friendship” between and among racial, ethnic and religious groups).

142. See Hernández-Truyol & Rush, *supra* note 126, at 246-47; Press, *supra* note 114, at 16.

The prevailing view in the US foreign policy establishment among some prominent human rights advocates has been that issues like housing, jobs, and healthcare involve questions of governmental policy, not principle, and cannot realistically be guaranteed as universal rights, particularly in poor countries with limited resources. Civil and political rights are negative liberties, the argument runs, requiring governments not to interfere actively in citizens’ lives, while economic and social rights impose positive obligations on states—obligations that cost money to enforce.

Id. But see Universal Declaration on Human Rights, *supra* note 119, at art. 22 (recognizing that when it comes to enforcing economic and social rights, “the organization and resources of each State” must be taken into consideration); African Charter on Human and People’s Rights, *adopted* by the Organization of African Unity at Nairobi, Kenya, on June 27, 1981, 21 I.L.M. 59 (entered into force on Oct. 21, 1986) [hereinafter African Charter]; American Convention of Human Rights, S. TREATY DOC. NO. 95-2, 9 I.L.M. 673, *opened for signature* Nov. 22, 1969 (entered into force July 18, 1978) [hereinafter American Convention]; see also Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951) [hereinafter OAS].

143. See Declaration on the Right to Development, G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, at 187, art. 6, 1-2, U.N. Doc. A/41/53 (1986) [hereinafter Declaration on Development] (declaring that all human rights and fundamental freedoms are indivisible and interdependent, and expressing that “equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.”). See generally Press, *supra* note 114 (expressing the importance of this interdependence of rights).

144. See Declaration on Development, *supra* note 143, at 186, preamble (recognizing that “development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of the active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”).

discrimination, apartheid, and segregation.¹⁴⁵ Further, and contrary to the U.S. position, the Development Declaration stated that the right to development—economic, political, civil, social, and cultural—“is an inalienable human right”¹⁴⁶ and “enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.”¹⁴⁷ The Development Declaration placed the responsibility for the creation of conditions favorable to realizing economic, social, cultural, civic, and political development on each individual State.¹⁴⁸

More recently, in 1993, the World Conference on Human Rights reinforced this emphasis on the protection of all human rights including equality and economic, social, and cultural development,¹⁴⁹ specifically denouncing institutionalized racism.¹⁵⁰

This international vision of economic rights as “primary” human rights urges a reconstruction of the U.S. model to include as fundamental *any* form of economic right. Indeed, such an indivisibility and interdependence approach poignantly explicates the reality that our successes—as in the political achievements of Blacks as United States citizens, and our failures, embodied in the segregation and wealth disparities that have been discussed here, cannot be isolated from one another. Undoubtedly, the right to vote means very little if one is systematically oppressed, hungry, homeless, uneducated, unemployed, underemployed, or unable to care for one’s family.

Because, under the international human rights model, economic rights are interdependent with and indivisible from civil and political rights, the need to remedy segregation and wealth disparities becomes more urgent, more real, more

145. *See id.*

146. *Id.* at 186, art. 1, 1.

147. *Id.* at 186, preamble.

148. *See id.* at 186, art. 3, 1; *id.* at 187, art. 6, 3 (placing responsibility on individual states to “take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights.”); *see also id.* at 187, art. 8, 1.

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income Appropriate economic and social reforms should be made with a view to eradicating all social injustices.

Id.

149. *See generally* World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (1993) [hereinafter Vienna Declaration]; Report of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13 (1994) [hereinafter Cairo Conference]; Beijing Declaration and Platform for Action, United Nations Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995) [hereinafter Beijing Declaration]; Report of the World Summit for Social Development, U.N. Doc. A/CONF.166/9 (1995) [hereinafter Social Summit].

150. *See* Vienna Declaration, *supra* note 149, at I(1), I(19) (considering the elimination of racism and discrimination a primary objective in the promotion of human rights).

concrete. As many human rights theorists recognize, all levels of rights are necessary for human development.¹⁵¹ But, in the United States, over the past three decades, the gap between rich and poor has increased, as has the disparity between Black wealth and white wealth.¹⁵² These realities are evidence of the need to protect and promote not only civil and political rights but also social and economic rights.¹⁵³ Because economic rights are part of the fabric of personhood and human dignity, we would, as a nation, be better off if we viewed economic and social rights as part of the tapestry of rights that are fundamental, in addition to civil and political rights. Only the protection and promotion of *all* rights will enable all persons—Black and white—to achieve equality to live the “good life.”¹⁵⁴

B. Reconceptualizing Economic and Wealth Disparities as Violence

In order to analyze the problems of inequality, the other suggestion, which flows from the use of the international human rights construct, is to view these economic and wealth disparities through a prism of violence. This approach has been very successful in motivating diverse communities to work against injustice in the international sphere.¹⁵⁵ Historically, the anti-violence paradigm formed the foundation of early treaties protecting minority populations.¹⁵⁶ To be sure, the Geneva Conventions furthered the condemnation of certain forms of violence against particular populations in wartime.¹⁵⁷ With Nuremberg and more recently

151. See generally Hernández-Truyol & Rush, *supra* note 126; see also AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); THE QUALITY OF LIFE (Martha Nussbaum & Amartya Sen eds., 1993).

152. See Press, *supra* note 114, at 14. See generally MASSEY & DENTON, *supra* note 4; OLIVER & SHAPIRO, *supra* note 2.

153. See Press, *supra* note 114, at 13-14. Press urges the U.S. to join International Human Rights efforts by arguing that

[a]t a time of rising inequality and growing concern about the consequences of unregulated global capitalism, making the right to education, shelter and other basic necessities coequal with civil and political rights is not only long overdue; it may also be the only way for the human rights movement to recapture the power and urgency that faded somewhat after the end of the cold war. In much of the world, after all, the struggle for access to basic necessities like education and medical care has become every bit as urgent as the struggle free for speech or fair trials.

Id.

154. This is consistent with Oliver and Shapiro's notion that economic well-being is an important factor in the “good life.” OLIVER & SHAPIRO, *supra* note 2, at 2.

155. See Hernández-Truyol, *supra* note 131, at 14. See generally THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (compiled by M. Cherif Bassiouni).

156. See Hernández-Truyol, *supra* note 131, at 5-6.

157. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950; entered into force for the United States Feb. 2, 1956) (dealing with the law governing humanitarian law); Geneva Convention

with Yugoslavia and Rwanda, culminating with the formation of the International Criminal Court, there has been a wholesale condemnation of violence perpetrated against specifically targeted populations during times of war, including a condemnation of violence perpetrated against persons because of their race, sex, ethnicity, or religious affiliations.¹⁵⁸

During the 1993 Human Rights Conference in Vienna, women learned first-hand of the utility of the violence paradigm.¹⁵⁹ At that time, the paradigm seemed to unite women from all walks of life—from the North and the South, the East and the West—in the condemnation of violence against women. It was then that women *en masse* claimed that women's rights are human rights.¹⁶⁰ Thus, a world conference on human rights that had failed even to place women on the agenda turned its focus on women—a focus that continued in Cairo,¹⁶¹ Copenhagen¹⁶² and Beijing.¹⁶³ Despite these successes and notwithstanding the condemnation of physical and psychological violence, women's economic disenfranchisement and destitution worldwide continued. In response to this incoherence, in 1996, Hernández-Truyol suggested in *Sex, Culture and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*,¹⁶⁴ that economic subordination of women worldwide be viewed as violence as it is an effective, mobilizing, coalition building tool.¹⁶⁵

Similarly, now, there is a need for a "re/vision of facts that constitute violence against [Blacks]"¹⁶⁶ to include economic and wealth inequality.¹⁶⁷ We urge that "we the people" view the realities of economic discrimination, wealth disparity, and segregation of Blacks as racial violence because that is exactly

Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

158. See generally THE STATUTE OF THE INTERNATIONAL COURT, *supra* note 155.

159. See generally Hernández-Truyol, *supra* note 13.

160. In 1994, the U.N. Human Rights Commission established a Special Rapporteur on Violence Against Women to examine the causes and consequences. See Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT'L L. & POL. 201, 202 (1994) (explaining the coalescing of women from all states and from all walks of life to condemn violence against women).

161. See Cairo Conference, *supra* note 149 (explaining that "[t]he right to development is a universal and inalienable right").

162. See Social Summit, *supra* note 149 (referring to the right to development as "universal, indivisible, interdependent and interrelated" human rights).

163. See Beijing Declaration, *supra* note 149 (discussing "women and the environment").

164. See generally Hernández-Truyol, *supra* note 13.

165. See *id.* at 608.

166. *Id.* at 607 (suggesting that "a re/vision of acts that constitute violence against women is necessary for gender equality—both domestically and internationally—to become a reality").

167. Compare *id.* at 609. (stating that "[t]he Article's proposed model presents a re/constructed notion of violence, that not only facilitates discourse on violence itself, but also engenders an environment that will enable the eradication of violence and the promotion of women's self-determination, empowerment and equality").

what it is. This genre of violence perpetuates poverty, maintains joblessness, denies education, allows social and physical deterioration of peoples and communities, devalues achievement, and encourages failure. These realities reflect an irretrievable breakdown of our beloved labor desert theory and sustain a third world within our own first world.

Moreover, inherently unequal employment opportunities perpetuate the disparities between Blacks and whites. Indeed, unequal existence of Blacks in public office denies them political and civil rights as well as full enjoyment of social, economic, and cultural rights.¹⁶⁸ As the United Nations 1996 report explains, employment—the opportunity to secure one’s livelihood—is an essential element of economic rights and freedoms¹⁶⁹ in earning income and eventual accumulation of wealth. Furthermore, disparities in the number of Blacks in high-level jobs in the private sector also prevent Blacks from having equal access to economic resources, accounting in part for the wealth disparities between Blacks and whites.¹⁷⁰

Similarly, denial of equal access to education¹⁷¹ creates disparities, foreclosing Blacks from job opportunities and limiting Blacks to lower paying jobs. These systematic denials of equality in employment, politics, and education have historically caused wealth disparities between Blacks and whites.¹⁷²

To date, this economic violence has been institutionalized and reaffirmed, instead of fought and fixed. The future will continue to be a reflection of our past until we adopt measures to pave the way to change and reformation. In short, society should construct, or more appropriately deconstruct, wealth disparities and segregation as economic violence.

In the context of the suggested paradigm, it is a human rights violation to deprive human beings of full personhood and to injure the dignity of the human spirit. As asserted by Reed Brody, advocacy director of Human Rights Watch, “[i]f we are serious about the violation of human dignity represented by issues like preventable disease, homelessness and poverty, we need to hold states accountable for these abuses just as we do for torture and murder.”¹⁷³ Until United States society recognizes, as international society has, that economic equality is essential and should be regarded as a “primary right,” then inequality will persist in the U.S., tainting our future as it has our past.

168. Cf. *id.* at 617 (explaining the existence of the same phenomenon with respect to the lack of women in public office).

169. See U.N. HDR 1996, *supra* note 113, at 87.

170. See MASSEY & DENTON, *supra* note 4, at 219. As discussed earlier, another reason for the disparity in wealth is the historical denial of blacks from accumulation of property and homestead. Cf. Hernández-Truyol, *supra* note 13, at 617.

171. See FEAGIN, *supra* note 7, at 24.

172. See generally MASSEY & DENTON *supra* note 4; OLIVER & SHAPIRO, *supra* note 2.

173. See Press, *supra* note 114, at 17 (quoting Reed Brody, advocacy director of Human Rights Watch).

C. *The Underpinnings of Inequality*

By reviewing the liberal republican roots of the United States' approach to human rights, this section seeks to explain the disconnect in the United States, explored in the sections above, between civil and political rights, on the one hand, and social, economic, and cultural rights on the other. As will be revealed, the focus on the autonomous individual has starkly and stubbornly stood in the way of an embrace to an approach that seeks systematically to change the subordination of any group.

The adoption of the Universal Declaration ostensibly reveals the commitment of states to the protection of a "collection of indivisible, interdependent, and inviolable rights that include not only civil and political rights, but also social, economic, cultural, and solidarity rights."¹⁷⁴ However, a critical examination of the U.S. approach to human rights reveals much about the United States' system and its current condition.

For one, the reluctance of the United States to sign the Economic Covenant dates to the early days of the global human rights initiative. As discussed earlier, the aspiration of the signatories of the Universal Declaration was that a single treaty, binding on States, would result. However, during the meetings concerning a single human rights convention, it became apparent that the United States, embracing its individual autonomy and liberal republican ideology, was comfortable only with the grant of civil and political rights.¹⁷⁵ Thus, the U.S. embraced only "those 'negative' rights of individuals to be free from governmental interference."¹⁷⁶ Simultaneously, the United States rejected undertaking any positive obligations involving granting social, economic, and cultural rights. This posture is evidenced today by its refusal to ratify the

174. Hernández-Truyol & Rush, *supra* note 126, at 245-46 (explaining that included in the Universal Declaration were rights such as the right to social security, full employment, fair working conditions, and an adequate standard of living which are all considered economic in nature). See Universal Declaration on Human Rights, *supra* note 119; see also ICCPR, *supra* note 132, at part III, arts. 6, 7, 8(1)-(2), 15, 16, 18. See generally ICESCR, *supra* note 133.

175. See Hernández-Truyol & Rush, *supra* note 126, at 246.

176. *Id.* See also Mary G. Dietz, *Context Is All: Feminism and Theories of Citizenship*, DAEDALUS, Fall 1987, at 4-5 (explaining that interestingly, and perhaps ironically, the liberal vision, while stuck on civil and political rights even at the expense of the greater societal good, recognized the inviolability premise: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . The rights secured by justice are not subject to political bargaining or the calculus of social interests.") (quoting JOHN RAWLS, A THEORY OF JUSTICE (1971)). Negative rights focus on the individual's personal rights with the consequent effect of placing limits on actions of governments—the freedom from government interference with the conception of rights. Positive rights, on the other hand, are those that articulate that a social bill of rights have attached to them positive government obligations. See generally CHARLES TAYLOR, HUMAN RIGHTS: THE LEGAL CULTURE, excerpted in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 173, 174-76 (Henry J. Steiner & Philip Alston eds., 1996).

Economic Covenant.¹⁷⁷

In contrast to the U.S. position, the so-called Third World States, as well as the communist "Second World" States,¹⁷⁸ firmly held that true liberation and freedom could only result from the grant of positive rights: social, cultural, and economic.¹⁷⁹ The guarantee of these rights constitutes an obligation on each individual State to ensure the basic subsistent well-being of all its peoples. To be sure, this does not require that any State do more than it can do. Rather, it requires States to craft, within their means, a framework within which all of the States' inhabitants can be free from want and hunger and enjoy safe housing and basic economic security.¹⁸⁰ Negative rights would perpetuate silence and oppression; but, when the playing field is not even, positive rights give voice and create a possibility for equality.¹⁸¹

Ultimately, however, which rights are embraced by the U.S. is an issue of priorities and domestic policies.¹⁸² The Western liberal view (mis)leads one to believe that only civil and political rights, the so-called "primary" or "first generation" rights, are necessary or important for human flourishing.¹⁸³ An examination of the roots of civil and political rights dates to the American Declaration of Independence¹⁸⁴ and the French *Declaration des Droits de L'Homme*¹⁸⁵ (Rights of Man). Both documents resulted from late eighteenth century political and social uprisings that sought to identify impermissible governmental intrusions into individual lives.¹⁸⁶

But perhaps foretelling the weaknesses and limitations of a singular focus on political rights, these eighteenth-century social and political revolutions coexisted with the proverbial "skeletons in our closet"—slavery, capitalistic oppression of

177. See Dietz, *supra* note 176, at 4 (explaining that "[t]he life of liberalism . . . began in capitalist market societies, and as Marx argued, it can only be fully comprehended in terms of the social and economic institutions that shaped it"); see also Hernández-Truyol, *supra* note 131, at 16.

178. See Hernández-Truyol, *supra* note 131.

179. Many Eastern European countries and some "developing countries" such as South Africa and India, actually recognize economic and social rights in their constitutions. See Press, *supra* note 114, at 16.

180. See generally ICESCR, *supra* note 133.

181. See generally Hernández-Truyol, *supra* note 131; The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, U.N.G.A. Res. 1514, U.N. GADR, 15th Sess., Supp. No. 16, U.N. Doc. 4684 (1961).

182. See Press, *supra* note 114, at 16-18.

183. See Hernández-Truyol & Rush, *supra* note 126, at 247 (explaining that the United States recognizes as most important those rights protected in the Bill of Rights).

184. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

185. *French Declaration des Droits de L'Homme (Rights of Man)*, reprinted in HUMAN RIGHTS IN WESTERN CIVILIZATION 1600 TO THE PRESENT 27-28 (John A. Maxwell et al. eds., 1994).

186. See Hernández-Truyol & Rush, *supra* note 126, at 247-48 (noting that while also based on revolution, the anti-colonialist and post-socialist revolutions, the champions of social, economic, and cultural rights, sought to impose positive obligations on states for the well being of communities and society).

indigenous peoples, and subordination of women and their status as chattel—which are hardly consistent with equality.¹⁸⁷ Rather, the social conditions of slavery and the chattel status of all women are classic examples of how power can be used to oppress the minority.¹⁸⁸

Thus, we have to own up to the melange that constitutes liberalism and its embeddedness in the United States' view on rights. In its origins, liberalism was both good and bad. Good in that it centered on the notion that *men qua* persons were entitled to and possessed a plethora of rights—autonomy, dignity, self-respect, freedom, and liberty to choose one's own values—and bad because it was *men*, not persons who were entitled to such personhood. That conceptualization of white male as human and human as white male became normative and, as such, persists today.

Yet, it is the liberal language of rights that women and slaves themselves have used in their own liberation projects. It is this language that is appropriated and utilized today by indigenous groups and marginalized racial, ethnic, and sexual minorities to clamor for their rights. Thus, we do not want to throw the liberalism baby out with the proverbial bath water. Rather, we need to think about it in a way that can include *all* persons and as a weapon against the very denials of liberties with which, in the past, it coexisted.

In this movement society needs to continue to work on the persisting problem of man as the ubiquitous norm. In doing so, society must recognize the need to address the necessitous condition of whole segments of our society as such, not as simply autonomous individuals.

While everyone can agree that civil and political rights are desirable and necessary, current interventions into equality discourses evidence the need for a paradigmatic shift that also embraces social and economic conditions within the framework of fundamental entitlements. In short, while recognizing the significance, importance, and value of a reformed version of liberalism, we must also undertake a communitarian-based interrogation of the condition, including object destitution, poverty, and overwhelming social, economic, and educational disadvantages of some of our communities. Communitarianism, then, is concerned with the “balance between social forces and the person, between community and autonomy, between the common good and liberty, between individual rights and social responsibilities.”¹⁸⁹

This balance between autonomy and the community good advocates democracy and facilitates a more accessible notion of equality.¹⁹⁰ International

187. See Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction of International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 90 (1993) (stating that “the presence of patriarchy in these emancipatory structures [of liberalism] reveals the gap between liberal concepts and reality”); see also Ursula Vogel, *Marriage and the Boundaries of Citizenship*, in THE CONDITION OF CITIZENSHIP 76, 79 (Bart van Steenbergen ed., 1994).

188. See Hernández-Truyol & Rush, *supra* note 126, at 247.

189. Amitai Etzioni, *Introduction to THE ESSENTIAL COMMUNITARIAN READER*, at ix, x (Amitai Etzioni ed., 1998).

190. See *id.*

human rights regimes operate on both liberal and communitarian principles considering both individual and group rights, emphasizing the importance of political and civil rights but recognizing the interdependence of those rights with social, cultural, and economic rights. This transformation of liberalism, together with the two-part proposal, provides a starting point in the quest for true equality between Blacks and whites.

CONCLUSION

This proposal for a reconceptualized version of a system of rights that embraces a holistic amalgam of civil and political rights as well as social, economic, and cultural rights is not totally out in left field. While it is true that Western States, in general, have resisted the notion of social and economic rights, years ago President Franklin Delano Roosevelt appears to have wholeheartedly embraced them. President Roosevelt's Four Freedoms speech,¹⁹¹ in which he discussed four essential human freedoms, established the third freedom as the "freedom from want which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world."¹⁹²

Later, in his State of the Union message to Congress, delivered on January 11, 1944, President Roosevelt articulated many of these economic rights as part of his vision for a truly free United States of America. He noted that "true individual freedom cannot exist without economic security and independence," that "[p]eople who are hungry and out of a job are the stuff of which dictatorships are made," and referred to these "economic truths [as being] self-evident."¹⁹³ The President then went further by asking for "a decent standard of living for all individual men and women and children in all nations" and likened freedom from fear to freedom from want, reflecting the foundation of the

191. See Franklin Delano Roosevelt, 87 CONG. REC. 44, 46-47 (1941), reprinted in FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 362 (1990).

192. *Id.* at 46. Fully, the four freedoms speech provided as follows:

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is the freedom of speech and expression everywhere in the world. The second is the freedom of every person to worship God in his[her] own way everywhere in the world. The third is the freedom from want, which translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world. The fourth is freedom from fear—which translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

Id.

193. Franklin Delano Roosevelt, State of the Union Message, 90 CONG. REC. 55, 57 (1944).

Universal Declaration and Economic Covenant.¹⁹⁴ Implicit in Roosevelt's words is the notion embraced by the international human rights paradigm that the "two sets of rights are not mutually exclusive but interrelated."¹⁹⁵

President Roosevelt's vision encompassed a long list of economic rights including the right to earn enough to provide food, clothing, and recreation to one's family, the right to ownership of a decent home, and to adequate medical care, the opportunity to achieve and enjoy good health, the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment, as well as the right to quality education.¹⁹⁶ These rights echo those economic rights listed in the Universal Declaration and the Economic Covenant.¹⁹⁷ President Roosevelt also observed that political rights alone are not sufficient, because necessitous persons are not truly free. Roosevelt spoke under the premise under which we work here: that, without economic security and independence, freedom is illusory.

In fact, Roosevelt viewed these economic rights as a second bill of rights which would form a "new basis of security and prosperity."¹⁹⁸ Collectively, he concluded with words that should make a call to arms today: Americans "cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure."¹⁹⁹

194. *See id.*

195. Press, *supra* note 114, at 14 (explaining that poverty and illiteracy frequently lead to an inability to exercise one's political and civil rights just as the absence of political freedom facilitates gross economic abuse). *See also* THE QUALITY OF LIFE *supra* note 151 (advocating a "capabilities approach" to human rights that pinpoints the basic material resources necessary for individuals to realize their rights, full potential, and abilities as human beings).

196. *See* Roosevelt, *supra* note 193, at 57; *see also* Press, *supra* note 114, at 14.

197. *See* ICESCR, *supra* note 133, at Part III, art. 7(a)(i), (ii), (b), (c).

198. Roosevelt, *supra* note 193, at 57.

199. *Id.* Recognizing the origins of the country in the sacredness of political rights, Roosevelt also recognized that

as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous [wo]men are not free [wo]men." . . . In our day these economic truths have become accepted as self evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race or creed.

Id. Roosevelt continued to enumerate the new rights

to a useful and remunerative job . . . to earn enough to provide adequate food and clothing and recreation . . . [of farmers] to raise and sell his[her] products at a return which will give him[her] and his[her] family a decent living . . . [of business [wo]men] . . . to trade [free] . . . from unfair competition . . . of every family to a decent home . . . to adequate medical care and . . . to achieve and enjoy good health; to adequate protection from the economic fears of old age, sickness, accident and

Yet it seems that in pursuit of liberalism (individual autonomy), we have systematically rejected this notion of economic rights. We would do well to acknowledge that while we are all individuals, we all are also part of various and varied communities; therefore, as members of the U.S. community, we should not be content if members of any of our subcommunities are systematically living in deprivation. We should embrace FDR's sentiments, particularly in light of the incredibly depressing data on wealth and income disparities between the Black and white communities in the United States. As Martin Luther King, Jr. so eloquently stated, "[i]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."²⁰⁰ Simply put, if we are ever to enjoy *true* equality, we must commit to the full personhood ideal that only the full panoply of human rights can realize.

However, the current system recognizes a less-than-full citizenship status of Blacks in the United States. Therefore, in conceptualizing violence, society must look beyond guns and fists, to dignity and employment. Collectively, society must give a voice and face to those at the bottom of the ladder—stuck in a generational cycle out of which it will be increasingly difficult to emerge.

These insights provided by the analysis of our system, past to present, and its theoretical underpinnings expose the non-neutrality of domestic laws and their effect on current racial disparities between Blacks and whites. By revealing the flawed origins and application of norms, we can finally break the cycle of the past and reconstruct the domestic idea in an antisubordination, multidimensional, multicultural, inclusive manner—more reflective of the international human rights paradigm. In these reconceptualization efforts, it is imperative to ensure that new notions of justice are envisioned with paramount respect for personhood and human dignity, creating attainability of equality between Blacks and whites. The process of reconstruction of equality discourse must be transformational, dynamic, and ongoing in a profoundly different way.

unemployment . . . good education.

Id. Roosevelt concluded by noting that "unless there is security here at home there cannot be lasting peace in the world." *Id.*

200. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 77, 79 (1964).

PROPERTY, WEALTH AND INEQUALITY THROUGH THE LENS OF GLOBALIZATION: LESSONS FROM THE UNITED STATES AND MEXICO

LUCY A. WILLIAMS*

INTRODUCTION

Virtually all of the presentations at the Association of American Law Schools (AALS) Workshop on Property, Wealth and Inequality and the papers in this special edition situate their discussions within a United States context. This reflects the fact that most United States' legal academics and activists who are concerned about inequality tend to think of redistribution within a domestic framework.

I am not suggesting that persons working in these fields are United States' chauvinists. Indeed, quite the opposite is true. My experience is that those most integrally involved with issues of inequality are also quite concerned about the extreme poverty in much of the world. However, in our legal work, we tend to restrict the scope of our inquiry, assuming the viability of an analysis within a nation-state context.

In this Article, I argue that a national focus is not sustainable within a globalized economy. Of course, the extreme wealth and income disparities among nations is increasing exponentially, with the vast majority of wealth and income concentrated within a very few nations. But in an era of globalization of finance and trade production, it is shortsighted to operate from the perspective that the issue of inequality among nations does not have ramifications pertinent to any attempt to address poverty concerns within the United States. Particularly, by failing to understand the centrality of connections among the fields of social welfare policy, low-wage work, immigration and international economic organization, persons working in the cause of redistribution of income have often operated in analytical/theoretical vacuums. I posit that a specialized and isolated analysis often results in less than fully sophisticated political analyses and missed opportunities to develop effective poverty policies both within a domestic context and within a globalized economy. This AALS session sought to provide a forum for a more knowledgeable interchange among social welfare, low-wage work, immigration and global economic discourses, and began to draw threads among these fields, particularly focusing on ways in which U.S. policies connect to Mexico.

I first set out the reality of global inequality and the ways in which a failure to engage with global income and wealth disparity ignores critical issues within which any poverty analysis must be situated. I then look to the United States and Mexico, countries with a 2000-mile common border, as an example of the way

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in which multiple legal discourses should be analyzed through a cross-border perspective. Initially, I explore two historical contexts: long-standing labor and immigration ties between the United States and Mexico, and the creation of a false dichotomy within the United States of those in wage work and single parent families receiving social assistance benefits. I then focus on recent changes in U.S. social welfare policy toward single mothers, many of whom are in low wage work, and legal immigrants, the largest number of whom are from Mexico. I juxtapose these two groups to the single mothers employed in the Mexican maquiladoras and the women- and children-only villages in Mexico whose men are often undocumented immigrants in the United States. By exposing the artificiality of national borders vis-à-vis nationality and electoral voice, I pose the question of redistribution as a cross-border issue. Ultimately, my hope is that by bringing together seemingly disparate legal areas, scholars and activists can produce a more nuanced and comprehensive poverty strategy.

I. INEQUALITY THROUGH A GLOBAL PERSPECTIVE

Of course, extreme poverty exists in many countries of the world. But advocates and policy makers often do not focus on international poverty when dealing with income imbalances within the United States. Almost one-half of the world's population lives on less than two dollars a day and one-fifth live on less than one dollar a day.¹ Individuals in the richest twenty countries have an average income that is thirty-seven times that of the poorest twenty countries, and this gap has doubled in the past forty years.² This cannot be explained away through arguing that wealthier nations simply have higher standards of living.³ Social indicators such as infant mortality and malnutrition are manifestations of this great discrepancy in wealth.

In rich countries fewer than 1 child in 100 does not reach its fifth birthday, while in the poorest countries as many as a fifth of children do not. And while in rich countries fewer than 5 percent of all children under five are malnourished, in poor countries as many as 50 percent are.⁴

Relying on such data, one could develop a strong argument that richer nations,

1. WORLD BANK, WORLD DEVELOPMENT REPORT 2000-2001: ATTACKING POVERTY (2001). Of the world's six billion people, 2.8 billion live on less than two dollars per day and 1.2 billion live on less than one dollar per day. *See id.* at 3. Of these, 43.5% live in South Asia, 24.3% live in Sub-Saharan Africa, 23.2% in East Asia and the Pacific, 6.5% in Latin America and the Caribbean, 2% in Europe and Central Asia, and 0.5% in the Middle East and North Africa. *See id.* at Fig. 1. The number of poor has been decreasing in East Asia, but increasing in Latin America, South Asia, Sub-Saharan Africa and post-Soviet bloc European and Central Asian countries. *See id.* at 21-23.

2. *See id.* at 3.

3. *See id.* at 24 tbl. 1.2 (relative income poverty by region).

4. *Id.* at 3.

which have often been instrumental in colonial exploitation, have a moral imperative to take responsibility for the extreme poverty in much of the world. Yet, quite apart from any ethical necessity, if legal academics and advocates take the national context for granted in developing redistributive policy, we are often, in ostrich-like fashion, hiding our heads in the sand in a time of increasing global economic integration.

Many, particularly in the labor and welfare areas, have understandably focused attention on their domestic scene in light of the crisis of declining union power and the intensity of assaults on the welfare state. However, in so doing, our rhetoric often reflects a nostalgia for isolationism. A nation-state focus rests on several increasingly problematical assumptions, including, e.g., that nation-states can control the impact of capital flight and currency fluctuations; that immigration can be regulated through border enforcement of legal prohibitions established by nation-states; and that union density, even within a nation-state, will reach worker-majority levels and incorporate waged workers not currently included within any collective bargaining framework, so that vertical redistribution (from management to labor) through collective bargaining poses only limited risks of exacerbating horizontal inequalities (between higher paid unionized and non-unionized, low-wage workers).

Although perhaps some of these assumptions were plausible in the postwar years, current social reality is rapidly pushing in a different direction. Labor and welfare law cannot be viewed as "domestic issues" within any nation-state. In light of currently unfolding trends toward global economic integration, the concept of citizenship anchored solely in the nation-state is anachronistic. The expansion and liberalization of trade, mobility of capital and financing, breakdown of the Bretton Woods mechanisms for currency control, portability of many production techniques and equipment and emergence of third world manufacturing sharply call into question the assumption that employment and social policy can be made within a nation-state framework. All of this is in addition to the moral and political imperative for people in the developed world to accept responsibility for addressing the gross maldistribution of wealth and resources on a world scale.

Thus we cannot discuss redistribution within a domestic labor market as if the United States has no links to the rest of the world. Economic life in the United States involves massive cross-border capital and labor flows and integrated, cross-border production chains. Changes in, for example, labor and welfare laws in other countries often have important ramifications in the United States (and vice-versa), whether in the form of human migration, capital migration, or rising naturalizations of legal immigrants. More restrictive immigration policy, rather than reducing migration, may produce more undocumented immigrants, creating a quite different impact on U.S. low-wage labor markets than that produced by legal immigration. Progressive lawyers attempting to develop new institutional mechanisms for redistribution must grapple carefully with the tension between capital mobility and restrictions on the free movement of persons.

The relationship between the United States and Mexico highlights the implications of cross-border labor, welfare, immigration, and trade interactions,

particularly the impact of anti-NAFTA and anti-immigrant rhetoric on U.S. welfare policy, naturalizations, and the artificiality of borders vis-à-vis citizenship.

II. A BRIEF HISTORICAL OVERVIEW OF MEXICAN/U.S. LABOR INTERACTION

The Mexican/U.S. border was largely open until 1965. There were no immigration quotas based on nationality as there were for most other countries, but there were certain categories of people who were excluded from admission to the United States, such as prostitutes, and, interestingly enough, "contract laborers."⁵ However, this last exception was often honored in the breach.

Beginning in World War II, the Mexican and U.S. governments implemented a "guest-worker" program, the Bracero Program,⁶ under which Mexican men were transported into the United States to do agricultural or field work, often in deplorable conditions. This program was unilaterally terminated by the United States in 1964, in part because of U.S. union opposition⁷ and because of increased mechanization. Although officially defunct, the Bracero Program laid the groundwork for geographical patterns and social ties that later supported undocumented immigration.⁸

One year later, in 1965, partially in response to the Mexican government's statements of their reliance on the Bracero Program for job creation, the United States and Mexico collaboratively created the Mexican Border Industrialization Program, or Maquila program.⁹ This created a twenty-kilometer strip in Mexico

5. Act of Mar. 26, 1910, ch. 128, 36 Stat. 263, 264 (repealed 1952).

6. Act of Apr. 29, 1943, ch. 82, 57 Stat. 70 (eliminated 1964).

7. The United Farm Workers under Caesar Chavez was organizing in California beginning in the early 1960s, and Bracero workers were often brought in to undermine strikes since they would be deported if they resisted crossing picket lines. ROBERT A. PASTOR & JORGE G. CASTAÑEDA, *LIMITS TO FRIENDSHIP: THE UNITED STATES AND MEXICO* 348-49 (1988).

8. See ALAN RIDING, *DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS* 479 (1984); see also *infra* notes 49-51 and accompanying text.

9. The Maquila program is often referred to as a creature of the Mexican government because the Mexican executive branch, pursuant to its powers under article 89(1) of the Mexican Constitution, created favorable trade policies that encouraged foreign manufacturers to establish assembly lines in Mexico. See, e.g., DONALD W. BAERRESEN, *THE BORDER INDUSTRIALIZATION PROGRAM OF MEXICO* 3 n.c (1971); GERARD MORALES ET AL., *AN OVERVIEW OF THE MAQUILADORA PROGRAM* (1994), at <http://www.dol.gov/ilab/public/media/reports/nao/maquilad.htm> (last visited May 10, 2001). However, the U.S. government facilitated this effort with tariff schedule provisions 806 and 807 (now known as "9802"), under which manufacturers only paid tax on the value added to American components, e.g., the cost of labor and capital added by manufacture in Mexico. See HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, Ch. 98, subheading 9802 (U.S. Int'l Trade Comm'n Jan. 25, 2001), available at <http://dataweb/usite/gov/ssccripts/tariff/0101c98.pdf>; OFFICE OF NAFTA, *FREQUENTLY ASKED QUESTIONS AND ANSWERS (FAQS) ABOUT MAQUILADORAS*, at <http://www.mac.doc.gov/nafta/8313.htm> (last visited May 10, 2001) (discussing history and purpose of maquiladora program); ALTHA J. CRAVEY, *WOMEN AND WORK IN MEXICO'S*

along the Mexican/U.S. border to which U.S. firms could import finished, ready-to-assemble components and raw materials and hire low-wage Mexicans to assemble the finished products. As long as the finished products were re-exported to the United States, the firms were not subject to Mexican import restrictions or duties and only paid a U.S. tariff on the value added by the assembly in Mexico. The program expanded rapidly, hiring a different population than that employed under the Bracero Program—primarily young single women, including single mothers.¹⁰

That same year, for the first time, Congress enacted immigration quotas for the Western Hemisphere under the 1965 Amendments to the Immigration and Nationality Act.¹¹ While individual countries had no limits on the number of visas that would be granted, the law was later amended to establish an overall

MAQUILADORAS 15 (1998) (discussing interaction between Mexican and American policies); Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras*, *Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 762 (2000) (describing the Border Industrialization Program as the bilateral predecessor to NAFTA negotiated between Mexico and the U.S.); Susanna Peters, Comment, *Mexican Labor Law from Three Perspectives: The Constitution, the Trade Unions, and the Maquiladoras: Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226, 228-33 (1990) (discussing U.S. tariffs); A. Maria Plumtree, Note, *Maquiladoras and Women Workers: The Marginalization of Women in Mexico as a Means to Economic Development*, 6 SW. J. L. & TRADE AM. 177 n. 20 (discussing history of Border Industrialization Program originating between U.S. manufacturers and Mexican landowners).

10. See PASTOR & CASTAÑEDA, *supra* note 7, at 289-90. From 1974 to 1982, eighty-seven percent of the maquiladora workforce was female. As shifts in production occurred that required more managers to work with high technology equipment, more men were hired. See DAN LA BOTZ, MASK OF DEMOCRACY: LABOR SUPPRESSION IN MEXICO TODAY 164 (1992). However, in 1990, of the 371,780 workers in 1909 maquiladoras, sixty-one percent, or 226,483 were still women. See *id.* at 163. Recent estimates indicate that there are between 4000 and 4500 maquiladoras operating in Mexico. See Arriola, *supra* note 9, at 762 (4235 as of April 1999); *Alarm That 'Maquiladoras' May Up and Go*, LATIN AMERICAN NEWSLETTERS, July 6, 1999, at 306 (4079) (citing the Instituto Nacional de Estadística, Geografía e Informática (INEGI)); Julie Light, *Engendering Change: The Long, Slow Road to Organizing Women Maquiladora Workers*, June 26, 1999, at <http://www.corpwatch.org/feature/border/women/engendering.html>; Dan La Botz, *Women in Mexican Society, the Workforce, and the Labor Movement*, MEXICAN LABOR NEWS & ANALYSIS, vol. IV, no. 9, May 16, 1999, available at <http://www.igc.org/unitedelect/vol4no9.html>. Of the estimated one million plus employees in the Maquiladora industry, women workers make up fifty-six percent of the workforce, a declining percentage but an increase in overall numbers. See *id.* Pay is often less than one dollar per hour, a far cry from the minimum wage in the United States. See Arriola, *supra* note 9, at 766-69. Although maquiladoras traditionally targeted women between the ages of fourteen and twenty-four and required routine pregnancy tests to avoid paying for legally mandated pregnancy benefits, many of the female workers are single parents. See LA BOTZ, *supra*, at 176-77; SUSAN TIANO, PATRIARCHY ON THE LINE 87, 89, 92, 123, 137 (1994).

11. See 8 U.S.C. § 1151(a) (1965) (repealed 1976).

ceiling of 120,000 visas per year for the entire Western Hemisphere.¹²

Thus, long before the North American Free Trade Agreement (NAFTA)¹³ was ratified in 1994, the two countries had strong labor market ties, albeit largely driven by U.S. corporate interests. For many years, there had been mobility of labor from Mexico to the United States that had an impact on low-wage workers in both countries.¹⁴ It is within this historical context that the NAFTA and U.S. immigration policy was and continues to be debated.

III. TRADITIONAL U.S. SOCIAL WELFARE FOR POOR SINGLE MOTHERS

A critical parallel legal field that interacts with immigration and international trade law is that of social protection programs in the United States, particularly as they relate to expectations of participation in wage work. U.S. social welfare policy, set against the backdrop of the concept of rugged individualism, has always reflected an ambivalence about poverty, with certain groups (such as those legally defined as wage laborers) carved out for special treatment. As part of the Social Security Act enacted in 1935,¹⁵ both Unemployment Insurance (UI) and a program called Aid to Dependent Children (later called Aid to Families With Dependent Children (AFDC)), were established. The U.I. program was an acknowledgment that the United States was not a full-employment society, and that there would always be both frictional and structural unemployment. AFDC was designed to provide a less than subsistence amount for the children of single parents (predominantly women) and later the single parents themselves.¹⁶

However, the two programs were always viewed very differently: UI was “worthy” because it was tied to wage labor, and AFDC was “the dole” because it was not tied to wage work, but to parenting. This bifurcation of social programs allowed society to construct a false dichotomy between wage workers and welfare recipients. People who advocated for higher wages, better labor standards, and more expansive unemployment insurance benefits as a social safety net routinely distanced themselves from programs like AFDC that were needs-based programs for which eligibility was not directly connected to wage work.

The method of data collection and presentation regarding the number and percentage of welfare recipients who were connected to wage work reinforced this dichotomy. If one used “point in time” data, that is counting the percentage of those *on a given day who are both* receiving welfare *and* participating in wage work, there appeared to be very little overlap, as the data showed that only about

12. *Id.* (amended 1978).

13. 19 U.S.C. §§ 3301-3473 (2000).

14. See PASTOR & CASTAÑEDA, *supra* note 7, at 288-89, 315, 348-49.

15. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

16. Social Security Act Amendments of 1950, Pub. L. No. 81-734, §323, 64 Stat. 477, 551 (codified as amended at 42 U.S.C. § 606).

seven percent of welfare recipients were also in paid labor.¹⁷ But this type of data collection did not take into account the “cyclical welfare/work population,” the many who rotate between welfare and wage work on a regular basis.

Large numbers of people cycle between low-wage work and welfare programs. Not until the 1990s (immediately preceding the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹⁸) did studies begin to record participation of welfare recipients in wage work over a longer period, usually two years. These studies documented welfare and wage work as inextricably intertwined, thereby challenging the widely held assumption that welfare recipients are a category separate and distinct from paid workers. A majority of women receiving welfare move in and out of low-wage work on a regular basis.¹⁹ The problem, by and large, was not in a lack of work-effort, but the conditions of low-wage labor markets in the United States.

The U.S. legal rules concerning eligibility for benefits under the UI system reinforce the false dichotomy between wage workers and welfare recipients. Although low-wage workers contribute to the UI benefit-pool in the sense that employers pass payroll taxes onto them in the form of lower wages, UI rules exclude many low-waged workers, particularly women and people of color, from the definition of “employee.”²⁰ Most of the single mothers who moved from

17. See STAFF OF HOUSE COMM. ON WAYS & MEANS, 104TH CONG., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 474 (1996).

18. See *infra* notes 22-30 and accompanying text.

19. One study found that of the sixty-four percent of women on welfare for the first time who left the rolls within two years, almost one-half left for work. But three-fourths of those who left welfare eventually returned, and forty-five percent returned within a year. See LaDonna Pavetti, *The Dynamics of Welfare and Work: Exploring the Process by Which Young Women Work Their Way Off Welfare* (1993) (unpublished Ph.D. dissertation, JFK School of Government, Harvard University) (on file with author). Another study found that seventy percent of welfare recipients participated in some way in the labor force over a two year period: twenty percent combined work and welfare, twenty-three percent worked intermittently and were on welfare between jobs, seven percent worked limited hours and looked for work, and twenty-three percent unsuccessfully looked for work. The women in this study held an average of 1.7 jobs over the two-year period and spent an average of sixteen weeks looking for work. See ROBERTA SPALTER-ROTH, *MAKING WORK PAY: THE REAL EMPLOYMENT OPPORTUNITIES OF SINGLE MOTHERS PARTICIPATING IN THE AFDC PROGRAM* (1994).

20. For example, UI coverage requires not just a connection to waged work, but a *sufficient* connection. States set a minimum amount that the employee must earn within a designated period, thus disadvantaging low-waged and contingent workers. To meet monetary eligibility minimums, low-waged workers must work more hours than higher paid workers. See ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, *REPORT AND RECOMMENDATIONS* 17 (1995). In nine states, a half-time, full-year (i.e., 1040 hours of work) worker earning minimum wage is completely ineligible for benefits, while the worker who earns eight dollars an hour for the same hours of work is eligible. Likewise, a two-day a week, full-year worker earning minimum wage is ineligible in twenty-nine states, but the same worker earning eight dollars an hour is eligible in all but two states.

AFDC to wage labor and then lost their jobs were ineligible for the “worthy” UI Program.²¹ Thus they returned to AFDC as their “unemployment insurance” and were viewed as shiftless “non-workers.”

IV. RECENT SHIFT IN U.S. SOCIAL WELFARE POLICY VIS-À-VIS LOW-WAGE LABOR AND IMMIGRANTS

This brief history sets the critical context necessary to understand the recent dismantling of social protection in the United States. In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)²² rescinded the AFDC program, and created Temporary Assistance to Needy Families (TANF) as a “block grant” with wide state discretion.²³ Although there are few federal mandates in the new statute, two are central to the rhetoric of the new policy: 1) parents can only receive TANF for a maximum of five years in their lifetime,²⁴ and 2) states must have a fixed percentage of recipients in wage work and/or “workfare” (i.e., working off their TANF grant)²⁵ at certain points in time.²⁶ Thus the focus moves away from income support for poor women and children, and onto short term receipt of social welfare benefits with an assumed *permanent* transition into wage work.

This work requirement is pushing and will continue to push millions of new people into low-wage labor markets with little social welfare protection.²⁷ Over

See id.

21. *See* ROBERTA SPALTER-ROTH ET AL., INCOME INSECURITY: THE FAILURE OF UNEMPLOYMENT INSURANCE TO REACH WORKING AFDC MOTHERS (1994) (finding that only eleven percent of those who combine paid work and welfare receive UI).

22. Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. § 601) (1999)).

23. Each state receives a fixed allocation of money to distribute largely within the discretion of the state. *See* 42 U.S.C. § 604(a)(1) (Supp. 2000).

24. *See id.* § 608(a)(7). States can decide which families will be eligible for benefits and the length of time families are allowed to receive grants, as long as the state does not allow families to receive benefits for more than five years throughout their lifetime. *See id.* A number of states have limited that time to two years. *See, e.g.,* 1995 Mass. Acts ch. 5, § 110(f) (limiting receipt to twenty-four months in any five year period).

25. In addition, states may require mothers who have not found a private sector job within 2 months to work (usually in public sector employment), not for a paycheck, but in exchange for their welfare benefits. *See* 42 U.S.C. § 602(a)(1)(B)(iv) (Supp. 2000).

26. *See id.* § 607(a)(1). If states do not meet this requirement, the federal government penalizes it fiscally by reducing the state’s grant amount in the following year. *See id.* § 609(a)(3)(A).

27. As of December 1999, the welfare, or TANF, national caseload had dropped by forty-nine percent in the four years since the PRWORA had passed, with very little follow-up of or explanation regarding those not in wage work. *See, e.g.,* ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROGRAM, THIRD ANNUAL REPORT TO CONGRESS 17-20 (Aug. 2000), *available at* <http://www.acf.dhhs.gov/programs/opre/annual3.pdf>. There were 2,264,314 fewer families and

two million single parents, mostly women, many with little education and skill level,²⁸ are relying on low-wage labor or some source of income other than TANF. Of the 2.3 million families still on the rolls,²⁹ many will reach the mandatory lifetime limit within the next few years and will be terminated *regardless* of whether they have any reasonable opportunity to obtain paid labor or have any other source of income. Many poor mothers in the United States who previously moved in and out of low-wage work, recycling onto AFDC as their “unemployment insurance” can no longer do this due to the TANF time limits. They no longer have either AFDC or UI as a social safety net; thus many of them will be in a position in which they will have to accept paid labor with whatever conditions and wages they can get.³⁰ If they cannot find paid labor,

6,602,851 fewer recipients on the welfare rolls. *See id.*

28. In March 1999, an Educational Testing Service study found that without more education, two-thirds of welfare mothers lack the skills to advance economically, with a more severe impact on African-American and Hispanic women. However, many of the women could improve their prospects of moving into the middle class with minimal training. *See* ANTHONY PATRICK CARNEVALE & DONNA M. DESROCHERS, *GETTING DOWN TO BUSINESS: MATCHING WELFARE RECIPIENTS' SKILLS TO JOBS THAT TRAIN* (1999).

29. *See* ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 27.

30. The impact of this wage work dependency is unclear and evolving. Early studies questioned whether low-wage labor markets could incorporate the numbers who are being dropped from the welfare rolls. And, of course, the geographical impact is disparate, since the areas with a higher number of welfare recipients do not necessarily correspond with the areas of high job growth. For example, between 1992 and 1996, as the United States' economy moved out of recession, New York City experienced a net gain of 88,000 jobs. If this rate of growth continued and every new job were given to a New York City welfare recipient, it would take twenty-one years for all 470,000 adults on welfare in New York City to gain employment. *See* Alan Finder, *Welfare Clients Outnumber Jobs They Might Fill*, N.Y. TIMES, Aug. 25, 1996, at A1. Other estimates indicate that the economy can create the number of jobs needed, not on short notice, but only over the long-term. *See* Gary Burtless, *Employment Prospects of Welfare Recipients*, in *THE WORK ALTERNATIVE: WELFARE REFORM AND THE REALITIES OF THE JOB MARKET* 71, 87-88 (Demetra Smith Nightingale & Robert H. Haveman eds., 1995). But even if the economy can absorb these workers over the long-term, studies estimate that this huge influx of largely unskilled workers would depress wages, benefits, and working conditions. The Economic Policy Institute has estimated that by moving nearly one million welfare recipients into the labor force, the time limits on receipt of social protection for this population will initiate an eleven to twelve percent decline in real wages, but only for the bottom one-third of the work force. LAWRENCE R. MISHEL & JOHN SCHMITT, *CUTTING WAGES BY CUTTING WELFARE: THE IMPACT OF REFORM ON THE LOW-WAGE LABOR MARKET* 5 (1996).

Recent studies, while noting that there is little current evidence of an effect on unemployment or wages, continue to predict substantial effects on low-income workers. *See, e.g.*, MARÍA E. ENCHAUTEGUI, *WILL WELFARE REFORM HURT LOW-SKILLED WORKERS?*, URBAN INSTITUTE DISCUSSION PAPER (2001) (a ten percent increase in the number of wage-working welfare recipients will reduce the employment of low-skilled U.S.-born men by two percent and reduce their wages by .3%; will reduce welfare recipient wages by 1.5%; and in the long-run, will reduce the wages

they will be ineligible for further public assistance and therefore will be entirely dependent on private charity for survival.

Importantly from a labor law perspective, while the statute contains language prohibiting states from displacing regular employees with mothers in workfare job slots,³¹ it eliminated language in the prior statute which protected regular employees against "partial displacement."³² In other words, regularly paid employees can receive a reduction in their overtime hours or benefits, or can be cut from a full-time to a part-time job, and the work they had previously done for pay may then be performed without pay by workfare workers. Employers can also fill established vacancies and openings created by attrition with workfare participants.³³ The impact of the full and partial job displacement that will be caused by workfare requirements on currently employed workers is, of course, likely to increase substantially as the United States moves into the predicted recession.³⁴ Importantly, it is not inconsequential that most of those who will be displaced are unionized.³⁵

At the same time as the United States was rescinding its communal commitment to income support for single parent families, social protection law

of low-skilled women by 2.2%); Hilar W. Hoynes, *Displacement and Wage Effects of Welfare Reform*, in *FINDING JOBS: WORK AND WELFARE REFORM* (David E. Card & Rebecca M. Blank eds., 2000) (wages for female high school dropouts will be reduced from five to 14.5% depending on elasticities of labor demand); Robert I. Lerman & Caroline Ratcliffe, *Did Metropolitan Areas Absorb Welfare Recipients Without Displacing Other Workers?*, Urban Institute Discussion Paper, Series A, No. A-45 (Nov. 2000) (finding no current wage erosion, but recognizing that a serious recession "certainly weakens the wage and employment picture").

31. See 42 U.S.C. § 607(f)(2) (Supp. 2000).

32. *Id.* § 684(c)(1) (1994), *repealed by* Pub. L. No. 104-193, 110 Stat. 2167 (1996).

33. See *id.* § 607(f)(1) (Supp. 2000).

34. One early study, focused on New York City, predicted that the likely result from placing 30,000 workfare participants in *public sector* slots would be to displace 20,000 other workers and reduce wages for the bottom one-third of entire New York City workforce (*public and private*) by nine percent. See CHRIS TILLY, *WORKFARE'S IMPACT ON THE NEW YORK CITY LABOR MARKET: LOWER WAGES AND WORKER DISPLACEMENT 2* (1996). Indeed, a recent study confirms that as the number of employees in New York's Department of Parks and Recreation has declined from 4285 to 2025 between 1991-2000, the number of full-time equivalent workfare workers increased from 182 to 2237. See *Use of Work Experience Program Participants at the Department of Parks and Recreation*, INSIDE THE BUDGET, Nov. 2, 2000.

35. In addition to the impact on wages and displacement in low-wage labor markets in general in the United States, working conditions may also be affected. For example, welfare recipients have been assigned to workfare jobs with no toilets or drinking water, jobs removing rotting and infected animal carcasses with no gloves, jobs requiring the use of acidic-spray cleaning fluid without safety equipment—in other words, jobs that violate existing health and safety laws and that existing wage workers would refuse to take without improved conditions. See, e.g., *Capers v. Giuliani*, 677 N.Y.S.2d 353 (App. Div. 1998). Plaintiffs' affidavits in this case were printed in *Welfare as They Know It*, HARPER'S MAG., Nov. 1, 1997, at 24. Compare to the much discussed conditions of employment for single women in the maquiladoras. See Arriola, *supra* note 9, at 765-94.

was also altering the inclusion and identity of immigrants. The PRWORA rescinded eligibility of legal immigrants, including low-wage workers, for virtually all social welfare programs designed to assist the poor, including TANF, Food Stamps and Social Security Insurance.³⁶ While some of the social protection benefits have been restored, the restorations are almost exclusively for immigrants who were in the United States when the PRWORA was enacted in August 1996.³⁷ Therefore, the huge influx of legal immigrants who enter the country each year after 1996 are still ineligible for the majority of social protection programs not connected to high wages or long-term labor-market participation.³⁸

The connection between these immigrant provisions of the PRWORA and the NAFTA is critical to a cross-border poverty analysis. Mexicans are by far the largest group of legal immigrants who have chosen not to naturalize as U.S. citizens.³⁹ Indeed, in spite of the long Mexico-United States history of border exchange and guest worker programs, there has also been a societal perception that Mexicans did not have to assimilate because they were in the United States only as "temporary workers."

Two years prior to the passage of the PRWORA, the U.S. Congress ratified the NAFTA over the adamant opposition of virtually all U.S. labor unions. One bone that Congress threw to U.S. labor was the NAFTA-Transitional Adjustment Assistance Program that provided additional weeks of UI for retraining "workers" (excluding workers not covered by UI laws, i.e., many welfare recipients) who lose their jobs due to increased imports or capital flight generated by the NAFTA.⁴⁰ The result of these complex and often isolated legal revisions is that U.S. taxpayers are funding both extended UI benefits and the retraining of "workers" dislocated by U.S. trade policy, at the same time as they are defunding many social welfare benefits to low-wage workers who are welfare recipients and legal, often Mexican, immigrants.⁴¹

36. See PRWORA, Pub. L. 104-193, 100 Stat. 2261 (codified at 8 U.S.C. § 1611(a) (1999)).

37. See 8 U.S.C. § 1611(b)(5) (2000) (restoring Supplemental Security Income and Medicaid eligibility to certain immigrants, termed "not qualified" immigrants, who were receiving assistance on August 22, 1996); see also *id.* § 1612(a)(2)(F) (restoring Supplemental Security Income and Food Stamps to "qualified" blind or disabled immigrants residing in the United States on August 22, 1996).

38. In addition, there are other connections between migration and social protection benefits. For example, in 1997, certain legal residents were being stopped at the U.S. border because the Immigration Service had received information from a state that the immigrant had received Medicaid, or health care, benefits. The immigrants were denied reentry unless they agreed to reimburse the State for the past Medicaid received, although receipt of Medicaid does not create a legal debt. See *Settlement Reached in Medi-Cal "Debt" Reimbursement Case*, IMMIGRANTS' RIGHTS UPDATE, Sept. 16, 1998, at 8.

39. See PASTOR & CASTAÑEDA, *supra* note 10, at 323.

40. 19 U.S.C. § 2331 (2001).

41. See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519-28 (1995)

V. INTERACTION BETWEEN TANF RECIPIENTS AND MEXICAN IMMIGRANTS IN LOW-WAGE LABOR

These factors highlight a major tension between the expectation that the U.S. low-wage labor force can and must absorb all welfare recipients, and the understanding of the close connection of the United States with Mexican immigrants because of prior "guest worker" programs, proximity, economic disparity, large common border and numbers of Mexicans already in the United States. In particular, many in the U.S. labor movement and many left and progressive academics and advocates have taken an anti-immigration position because of an assumption that immigration reduces the power of particularly unskilled low-wage U.S. workers to negotiate higher wages and better working conditions.

Although studies on the impact of immigrants on the U.S. economy and labor conditions reach widely divergent conclusions,⁴² often finding positive economic

(describing the anti-Latin American, especially Mexican, immigrant sentiment regarding public benefits).

42. See ROY BECK, *THE CASE AGAINST IMMIGRATION* (1996); GEORGE J. BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY* (1990); DAVID M. HEER, *IMMIGRATION IN AMERICA'S FUTURE* 183 (1996); Joseph Altonji & David Card, *The Effects of Immigration on the Labor Market Outcomes of Natives*, in *IMMIGRATION, TRADE, AND THE LABOR MARKET* (John M. Abowd & Richard B. Freeman eds., 1991); George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LITERATURE 1667 (1994); George J. Borjas et al., *On the Labor Market Effects of Immigration and Trade*, in *IMMIGRATION AND THE WORK FORCE: ECONOMIC CONSEQUENCES FOR THE UNITED STATES AND SOURCE AREAS* 213 (George J. Borjas & Richard B. Freeman eds., 1992); Kristen F. Butcher & David Card, *Immigration and Wages: Evidence from the 1980's*, 81 AM. ECON. REV. 292 (1991); David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 INDUS. & LAB. REL. REV. 245 (1990); Ronald G. Ehrenberg & Robert S. Smith, *Worker Mobility: Migration, Immigration and Turnover*, in *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* (Ronald G. Ehrenberg & Robert S. Smith eds., 7th ed. 2000); Randall K. Filer, *The Effect of Immigrant Arrivals on Migratory Patterns of Native Workers*, in *IMMIGRATION AND THE WORK FORCE: ECONOMIC CONSEQUENCES FOR THE UNITED STATES AND SOURCE AREAS*, *supra*, at 245; Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, 9 J. ECON. PERSPECTIVES 23 (1995); Robert S. Goldfarb, *Methodological Commentary-Investigating Immigrant-Black Labor Market Substitution: Reflections on the Case Study Approach*, in *IMMIGRANTS AND IMMIGRATION POLICY: INDIVIDUAL SKILLS, FAMILY TIES AND GROUP IDENTITIES* 289 (Harriet Orcutt Duleep & Phanindra V. Wunnavala eds., 1996); Elaine Sorensen, *Measuring the Employment Effects of Immigrants with Different Legal Statuses on Native Workers*, in *IMMIGRANTS AND IMMIGRATION POLICY: INDIVIDUAL SKILLS, FAMILY TIES AND GROUP IDENTITIES*, *supra*, at 201; Robert H. Topel, *Regional Labor Markets and the Determinants of Wage Inequality*, 84 AM. ECON. REV. 17 (1994); Robert Waldinger, *Who Makes the Beds? Who Washes the dishes? Black/Immigrant Competition Reassessed*, in *IMMIGRANTS AND IMMIGRATION POLICY: INDIVIDUAL SKILLS, FAMILY TIES AND GROUP IDENTITIES*, *supra*, at 265; David A. Jaeger, *Skill Differences and the Effect of Immigrants on the Wages of*

effects⁴³ and no negative effect on wages and labor conditions, the claim that immigration of unskilled workers reduces wages and conditions is still frequently touted as "truth."⁴⁴ Thus immigrants and prior TANF recipients are being rhetorically pitted against one another.⁴⁵

The cumulative effect of these policies creates racist hierarchies within racist hierarchies. The rhetoric of social assistance portrays United States citizens receiving welfare as lazy women of color. The PRWORA "rehabilitated" them by removing any social safety net after five years and exchanging dependence on AFDC or TANF for dependence on low-wage employers. These U.S. citizens are, on occasion, perceived as in competition with legal immigrants, who have summarily lost eligibility for social assistance programs, and undocumented immigrants—both groups that have sent significant remittances to impoverished families in their countries of origin.⁴⁶ Having convinced the United States public

Natives (1995) (unpublished dissertation, University of Michigan) (on file with author).

43. For recent studies crediting immigration with facilitating the strong U.S. economy of the 1990s, see *infra* note 50.

44. See, e.g., Mark Helm, *Immigration Policy Hurting U.S. Poor, Critics Claim*, SUN-SENTINEL (Ft. Lauderdale), Mar. 12, 1999 (reporting that George Borjas, professor at Harvard University's Kennedy School of Government, testified before the House Subcommittee on Immigration and Claims that U.S. low-skill workers "lose an average of \$1915 a year because of [immigrant] competition").

45. For example, a U.S. General Accounting Office study found no need for an immigrant guest farm worker program in part because welfare recipients affected by either the time limits or the work requirements of the PROWRA will provide a surplus supply. See GENERAL ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS (1998). When the U.S. Immigration and Naturalization Service deported undocumented Mexican field workers, growers were encouraged to hire welfare recipients. Stephanie Simon, *Growers Say U.S. Wrong, Labor Is in Short Supply*, L.A. TIMES, Jan. 5, 1998, at A3. Of course, field work is seasonal, so workers are laid off for four to six months at a stretch with no social protection benefits. And, although some social workers and growers note that field work schedules vary depending on the weather and condition of the crop and that standard daytime child care is not always adequate, the U.S. Department of Labor takes the position that the child care needs in farm occupations are no different than that in other industries. See *id.*

46. An estimated \$6-10 billion in remittances is sent to families in Mexico each year. See Susan Ferriss, *Migrants Find Wiring Money to Mexico Now Cheaper*, ATLANTA J. & CONST., Mar. 4, 2001, at A10 (at least \$6 billion); Ruben Navarrette, Jr., *Fox Takes on Immigration, Mexican-Americans*, CHI. TRIB., Feb. 14, 2001, at 19 (\$10 billion); Tim Weiner, *Mexico Chief Pushes New Border Policy: Free and Easy Does It*, N.Y. TIMES, Dec. 14, 2000, at A12 (between \$6 billion and \$8 billion); Minerva Canto, *Fox Argues Open Borders Would Serve U.S., Canada*, ORANGE COUNTY REG., Nov. 29, 2000 (\$6 billion). These remittances provide "essential support for 1.1 million households in Mexico" according to the head of the Mexican National Population Council (CONAPO). Margaret Swedish, *US-Mexico Border: Immigration Flow Likely to Remain Steady Despite Enforcement Measures*, CENT. AM./MEXICO REP., May 2000, at http://www.rtfcam.org/report/volume_20/No_2/article_2.htm (last visited May 10, 2001).

that poverty is primarily a problem of work-effort, policymakers have created a situation that worsens the plight of former welfare recipients and fails to recognize the presence and impact of cross-border poverty.

A number of other factors make the relationship between immigration policy, TANF, and low-wage labor even more complex. Often policymakers, scholars, and activists across political persuasions have ignored the fact that, for certain industries, particularly those with high labor costs and geographical flexibility, capital is much more mobile across borders than humans. An anti-immigration policy which does not provide a supply of low-wage workers within our current economic structure may result in migration of certain job-sites entirely and, thus, even further diminution of U.S. labor conditions.

The reverse of this equation is reflected in an implicit assumption when the NAFTA was ratified that the flow of goods and finances from Mexico to the United States would be substituted for the flow of people, an assumption that required a pervasive economic development/job creation program in Mexico.⁴⁷ However, working at odds with such economic development in Mexico is the reduction (mandated by the International Monetary Fund structural macroeconomic adjustments) of agriculture subsidies that had benefitted both large- and small-scale farmers in rural areas.⁴⁸ The resulting agricultural crisis has resulted in both farm foreclosures (with resulting dislocation) and reduced economic activity in urban areas situated near prosperous agricultural areas.⁴⁹

Contrary to the assumption that NAFTA would reduce undocumented immigration, Census 2000 data indicate the opposite. The number of undocumented residents appears to be nine to eleven million rather than the six million that was predicted.⁵⁰ Economists are crediting this increased immigrant population, many working in low-wage unskilled jobs, with reducing pressures for wage increases, thus fostering a "full employment labor market environment without generating any additional wage inflationary pressures."⁵¹ Importantly, the

These remittances represent the second largest source of revenues in foreign currency, after tourism. See *Mexico: Remittances for Small, Medium and Micro Enterprises (SMME) and Infrastructure Development*, WORLD BANK GROUP at <http://www.wbln0018.worldbank.org/external/lac/lac.nsf.d77359c53> (last visited May 10, 2001). Also, they represent at least the third-biggest legitimate force in the Mexican economy, after oil and tourism. See Weiner, *supra*.

47. See Arriola, *supra* note 9, at 805; Monica L. Heppel & Luis R. Torres, *Mexican Immigration to the United States After NAFTA*, FLETCHER F. WORLD AFF., Fall 1996, at 51.

48. See TIANO, *supra* note 10, at 21.

49. See Frances Lee Ansley, *Rethinking Law in Globalization Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369, 380 (1998); Sarah Anderson et al., *NAFTA—Trinational Fiasco: Remember the Rosy Promises About Jobs, etc.? Here's a Reality Check*, NATION, July 15, 1996, at 26.

50. See D'Vera Cohn, *Illegal Residents Exceed Estimate*, WASH. POST, Mar. 18, 2001, at A1. The initial count tallied 281.4 million U.S. residents as opposed to the expected 275 million. The number of Hispanics, two-thirds of whom are Mexican, was 35.3 million rather than the estimated 32.5 million. See *id.*; see also D'Vera Cohn & Darryl Fears, *Hispanics Draw Even with Blacks in New Census*, WASH. POST, Mar. 7, 2001, at A1.

51. ANDREW SUM ET AL., AN ANALYSIS OF THE PRELIMINARY 2000 CENSUS ESTIMATES OF THE

majority of undocumented Mexican immigrants are men who leave behind their families, creating whole villages populated with only women, children and the elderly.⁵²

Finally, immigrant workers are not necessarily substitutes who displace existing workers or increase labor supply to the point of reduced wages and labor conditions. Rather a poverty/low-wage policy could be envisioned that juxtaposes each group of unskilled workers as complements.⁵³ Under that analysis, one might argue for a pro-education and training policy for TANF mothers to move them into a position to complement rather than compete with unskilled immigrants.

VI. THE POLITICAL FLUIDITY OF THE BORDER

Both U.S. social protection reductions and political democratization in Mexico appear to be catapulting Mexicans living in the United States into a central position that further explodes the concept of nation-state boundaries. In fact, the result of the welfare disqualifications of legal immigrants may be exactly the opposite of that intended by many of its proponents, i.e., to reduce the number of legal immigrants or to decrease the number of legal immigrants on the "public dole."

One major result of denying virtually all social assistance programs to legal immigrants was a startling surge in U.S. naturalizations, particularly among Mexicans. The denial of benefits to legal immigrants, and other recent anti-immigrant political actions, resulted in a new consciousness among long-term legal Mexican immigrants that they must be a part of the electorate, i.e., that they must become naturalized United States citizens that can vote.⁵⁴ Until 1994, the number of naturalizations by Mexicans legally residing in the United States was fairly stable. There were 17,564 naturalizations in 1990, 22,066 in 1991, 12,880 in 1992, and 23,630 in 1993.⁵⁵ In 1994, the year that Californians adopted "Proposition 187" (barring undocumented immigrants from receiving publicly

RESIDENT POPULATION OF THE U.S. AND THEIR IMPLICATIONS FOR DEMOGRAPHIC, IMMIGRATION, AND LABOR MARKET ANALYSIS AND POLICYMAKING 54, CENTER FOR LABOR MARKET STUDIES, NORTHEASTERN UNIVERSITY (Feb. 2001); Paul Magnusson, *The Border is More Porous Than You Think*, BUS. WK., Apr. 9, 2001, at 94.

52. MIGRATION BETWEEN MEXICO & THE UNITED STATES, A REPORT OF THE BINATIONAL STUDY ON MIGRATION 72 (1997); Ricardo Monreal, *A Governor from a Hardscrabble State Who Is Forging a New Style of Responsive Government*, TIME, May 24, 1999, at 62; Eric Schlosser, *In the Strawberry Fields: Migrant Workers and the California Strawberry Industry*, ATLANTIC MONTHLY, Nov. 1995, at 80.

53. See HEER, *supra* note 42, at 8-9.

54. U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 14 (1998) [hereinafter STATISTICAL YEARBOOK]; Paul Van Slambrouck, *Immigrants Shift Status: No Longer Sojourners*, CHRISTIAN SCI. MONITOR, Sept. 21, 1999, at 1.

55. STATISTICAL YEARBOOK, *supra* note 53, at 180.

funded education and most social services and health care, and directing local law enforcement authorities, school administrators, social workers and health-care aides to report suspected undocumented immigrants and, in some cases, legal immigrants),⁵⁶ the number of naturalizations surged to 46,186, and in 1995 to 79,614.⁵⁷ Most dramatically in 1996 (the year the PRWORA was being debated and enacted), Mexico was the leading country-of-birth of persons naturalizing, with 217,418 or twenty-one percent of total naturalizations.⁵⁸

Once they become U.S. citizens, Mexican-Americans have greatly expanded legal rights that allow them to bring family members into the United States. Thus, the ironic end result of anti-immigrant politics may be that even greater numbers of Mexican immigrants will settle in the United States, naturalize and vote. Questions arise about the effect of this potential increase in family-member legal immigrants on the low-wage labor force, and the interplay between that population and the influx of welfare recipients possibly competing for the same jobs.

Juxtapose these developments to recent dramatic changes in Mexican laws relating to dual citizenship and the ability of non-residents to vote in Mexican elections. Mexican non-residents are now allowed to maintain dual nationality in Mexico and in the country of their residence. This means Mexican immigrants who are naturalized U.S. citizens are now permitted to reclaim their Mexican nationality.⁵⁹ Mexico's constitution was modified to allow non-resident Mexican citizens to vote in Mexican elections without returning to Mexico.⁶⁰ Although not yet implemented at the time of the 2000 elections (in which the Institutional Revolutionary Party (PRI) was defeated for the first time since 1920 by the National Action Party (PAN)), almost ten million Mexicans more or less

56. The core provisions of Proposition 187 were struck down by U.S. District Judge Mariana Pfaelzer, and a subsequent settlement was mediated between the state and opponents of the initiative, in which Governor Gray Davis agreed to drop the state's appeal. *See* *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), *modified by* 997 F. Supp. 1244 (C.D. Cal. 1997), *modified by* No. 94-7569 MRP, 94-7652 MRP, 94-7570 MRP, 95-0187 MRP, 94-7571 MRP, 1998 WL 141325 (C.D. Cal. Mar. 13, 1998); Dave Leshner & Henry Weinstein, *Prop. 187 Backers Accuse Davis of Ignoring Voters*, L.A. TIMES, July 30, 1999, at A1.

57. STATISTICAL YEARBOOK, *supra* note 53, at 170.

58. *Id.* Of course, there were other legal changes which factored into this increase, most specifically the numbers of undocumented persons allowed to naturalize pursuant to the Immigration Reform and Control Act of 1986. 8 U.S.C. § 1101 nt. (1986). In subsequent years, the number has declined (134,494 in 1997 and 109,065 in 1998), but the percentage of persons from Mexico naturalizing has remained over twenty percent of the total naturalizations, and in fact increased (22.5% in 1996 and 23.6% in 1997). STATISTICAL YEARBOOK, *supra* note 53.

59. *See* CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 37 (amended 1997). Note the nuances between nationality and citizenship that are beyond the scope of this Article.

60. James F. Smith, *Vote Denied to Mexicans Living Abroad*, L.A. TIMES, July 2, 1999, at A1. Although the Chamber of Deputies approved a package implementing this election reform, the Senate (controlled by the PRI) allowed the measure to die in July 1999.

permanently residing in the United States could be eligible to vote in Mexican elections. They are expected to support either the PAN or the Party of the Democratic Revolution (PRD),⁶¹ both of which are Mexican political parties advocating the democratization of labor unions in Mexico.⁶²

Thus the huge increase in U.S. naturalizations by Mexicans (in turn opening the door for further immigration by family members) and the breaking open, or democratization, of Mexican political parties and unions could have broad implications for social protection and low-wage labor in both the United States and Mexico. The construction of dual nationality and dual voting privileges exposes the artificiality of protectionism and fixed borders which seems entrenched in social protection, low-wage labor, and immigration discourse.

CONCLUSION

The myriad of issues discussed above are not designed to yield a single coherent poverty policy, but rather to challenge us to frame new questions about strategies to address poverty, wealth and inequality within an increasingly globalized economy.

Did the U.S. labor anti-NAFTA position, albeit inadvertently, feed into a racist, anti-Mexican and anti-immigration policy, which then fueled the anti-immigrant backlash in U.S. welfare policy?

If one effect of social welfare cuts to U.S. legal immigrants is a surge in naturalizations with a subsequent increased flow of family members migrating to the United States, will this additional supply of wage workers entice certain plants to remain in the United States rather than relocate cross-border? How do these new immigrants correlate with those who would have obtained jobs if plants had moved to Mexico?

If immigration can expand or preserve certain industries in the United States, creating new jobs for complementary skill holders, should an effective U.S. poverty policy focus on increasing human capital of U.S. unskilled workers so that they might be able to take advantage of those new jobs? Could or should U.S. progressives support such a policy with its implications for further constructing and supporting racial hierarchies?

What is the connection, within both a class and gender analysis, of the single mothers in the maquiladoras, the TANF mothers, and the women-and-children-only towns? Men are involved in each setting in different ways, but there is little

61. See Patrick J. McDonnell, *U.S. Votes Could Sway Mexico's Next Election*, L.A. TIMES, Feb. 15, 1999, at A1.

62. See generally LA BOTZ, *supra* note 10. The Partido Revolucionario Institucional (Institutional Revolutionary Party or PRI), the political party that had been in power in Mexico since 1920, had held continuous office longer than any other party in the world. It has controlled the union structure by having an officially recognized union, the Confederación de Trabajadores de México (Confederation of Mexican Workers, or CTM). CTM leaders routinely were not democratically elected by membership, were bought off by the government and failed to represent their members to enforce, what on the books, is an excellent Mexican labor law.

discussion among lawyers dealing with child support and those aware of the huge remittances being sent back to Mexico.

What do we expect and who do we value in wage work? Why are we so concerned about ensuring that U.S. welfare recipients are in wage work, without acknowledging that many of them are and addressing both the ways in which low-income labor conditions and legal definitions construct their identities as non-workers? Conversely, why are we so derisive (within our rhetoric of "rugged individualism") of undocumented immigrants in U.S. wage labor who send critical remittances back to the women-and-children-only towns?

How do we begin to connect U.S. social welfare cuts and IMF structural macroeconomic adjustment policies, and analyze their impact on low-wage labor markets cross-border?

Finally and most fundamentally, how do we develop a cross-border poverty redistributive strategy? An ongoing tension in poverty debate is that between improving or maintaining living standards for low-wage workers and job creation for the unemployed poor. While often discussed as a policy question internal to a nation-state, the same issues are raised in cross-border poverty discourse. Where does a nation-state draw the line between its own citizens being in such poverty that it must protect their labor conditions through attempting to restrict migration of humans and its economy being solid enough and its citizens' living conditions sufficiently adequate that restrictive immigration may not be the priority? Can nations, in a time of the breakdown of borders through global economic integration, coherently establish that line? If a nation-state sets up an initial structure of attempted restrictive human mobility, will it ever reach a point of acknowledging that its internal poverty/unemployment is low enough that the country can focus on cross-border poverty? In other words, can an effective poverty policy be based on a protectionist position?

These are only initial questions and may not frame the most important interconnections. But if those committed to a redistributive poverty strategy do not struggle to engage in a complex cross-disciplinary, cross-border analysis of the interaction of low-wage labor, globalization, social welfare policy and immigration—if we do not begin to formulate the questions—we are missing an important opportunity to begin to provide answers that will contribute to the development of a more sophisticated and transformative redistributive policy.

RACISM: A MAJOR SOURCE OF PROPERTY AND WEALTH INEQUALITY IN AMERICA

DERRICK BELL*

Consider this film script:

RURAL TOWN GAS STATION—DEEP SOUTH IN THE MID-1960s.

It is dusk, the end of a hot summer day. A half-dozen or so working class, white, "good ole' boys" are grouped around a bench in front of a run-down, two-pump gas station. An outdoor phone is attached to the wall. A faded sign over the station garage reads: Moultree's Oil, Gas, Repairs. The men, dressed in farmer's bib overalls and plaid shirts or in khaki pants and undershirts, are horsing around, drinking beer, and chiding a teenager, BUDDY, who refuses to drink with them.

MOULTREE

(The owner of the gas station, an older man, and a figure of authority, points his beer at the boy.)

Com'on, Buddy boy. Jus' 'cause you finish high school and hopin' to go to that raggedyass state college over in Greenville, don' mean you can't join us with one of these beers.

BUDDY

(Hangs his head, obviously not wanting to argue.)

Mr. Moultree. This Coke is jus' fine.

GROUP

(The others hoot at the remark. They joke about the benefits of not finishing school and boast about how little schooling each has.)

ANDY

(Fat redneck, beer-belly, a troublemaker and proud of it, looks at Moultree.)

Guess you ain' tol' him, Moultree. Don' drink wit' the boys. Cain't work at Moultree's. And cain't work at Moultree's. Cain't afford to go to college.

J.T.

(Tall, relatively slender in comparison with the others. Grimaces to show he doesn't like Andy's comment.)

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You wrong on both counts, Andy. My baby brother wants to work, but he got one of thos' whatcha call 'em, scholarships. An' it ain't at no state college. It's Ole Miss.

BUDDY

(Frowns at his brother. Where he hopes to go to college was supposed to stay in the family until everything was worked out.)

GROUP

(Surprised and impressed by the news, they are also envious and even more anxious to cut Buddy down to size.)

MOULTREE

(In a dominating, almost threatening tone.)

You better off at State, boy. Ole Miss ain't Ole Miss no more now the Feds done forced that nigger, James Meredith in there. Looks like white men can't have nothin' to 'emselves no more. Watch what I say, niggers goin' take over the whole damn state.

GROUP

(Make faces expressing disgust and declare, cursing, that they are not going to let it happen.)

J.T.

(With vehemence, not wanting to be on the wrong side of this issue.)

You right there, Clem. Mama an' Daddy wranglin' over this thing ever since Buddy got the letter. Daddy say no chile o' his'n goin' to no school that takes in niggers. Mama let him talk, but my money say, Buddy goin' to Ole Miss.

TOD

(The elder of the group, with little hair, fewer teeth, sits on a barrel.)

I tell you. Our Negras was happy 'till them Northern do-gooders come down here stirrin' em' up. My granpappy tol me same thing happened after the Confederacy. Northern do-gooders swarm in here like flies on horseshit, gave our darkies all manner o' big ideas. They got tired, after while. Left on their own—though we helped some git on back where they come from. Then we scared the niggers back into shape. Happen before, it'll happen again. Mark my word!

ANDY

Damn right, Tod. Way it suppos' to be. White man take what he want. Niggers get the leftovers. Fair and square how I sees it.

BUDDY

(Looks hard at Andy, then at the rest of the group. He speaks in a low voice but with some feeling.)

Been readin' a lot and thinkin' a lot. Sure, we whites kin have what we want long as what we want's is drinkin' beer in the heat and dust 'round a two-pump station out in the country. That, and keepin' niggers down. None of us got much of nothin' worthwhile. Meantime, the fat cats runnin' the companies and gettin' themselves elected to high office livin' better 'n we ever dream. When we goin' to get smart?

J.T.

(Embarrassed at his brother's remarks that distance him from the only group he knows.)

We goin' to get real smart after you finis' college, Buddy. You goin' smart us up real good. Right, boys?

GROUP

(Laughs long and hard at Buddy's expense. Buddy lapses back into silence, staring at the Coke bottle in his hand.)

TODD

(Looks at Buddy hard. He is serious, not laughing.)

Naw, J.T. He ain't gonna smart us up. White boys like Buddy go to college, get in line for good-payin' jobs, marry them trophy women with long hair, hands ain't never been in no soapsuds. Buddy go to college, won't have no time for the likes of us. Soon be one of them fat cats, treatin' us like we niggers. He too young to know. We ain't got no choice. Got to treat the darkies bad so they can't forget that they's on the bottom—not us.

The characters in this excerpt from one of my stories¹ would seem highly unlikely culprits in the inequalities of wealth attributable to race. And yet their racial beliefs—as much a part of them as their southern drawls—are significant if not crucial to understanding the differences, disparities and ongoing discontent attributed to race. Young Buddy's observation that racism harms the hater as much as the hated sums up a phenomenon as old as the nation's history.

The historian, Edmund Morgan, explains that plantation owners convinced working class whites to reduce Africans to life-term indentures (slavery) even

1. DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME* 103, 105-09 (1996).

though, without slaves, poor whites could never compete with the wealthy landowners who could afford them.² Slave holders appealed to working class whites, urging that because they were both white, they had to stand together against the threat of slave revolts or escapes. It worked, and in their poverty, whites took out their frustrations by hating the slaves rather than their masters who held both black slave and free white in economic bondage. Thus, even in that early time, race was the crucial lever through which wealthy whites shifted attention from their privileged status to Africans reduced to slavery.

While slavery ended, the economic disadvantaging of a great many whites—camouflaged by racial division—continued to obscure the real cost of their allegiance to whiteness. Formal segregation, a policy insisted on by poorer whites, simultaneously subordinated blacks and provided whites with a sense of belonging based on neither economic nor political well-being, but simply on an identification based on race with the ruling class and a state-supported belief that, as whites, they were superior to blacks. Racism's stabilizing force was not limited to poorer whites. Even for wealthier whites, their identities were unstable because they were intrinsically dependent upon an "other." White, racist antipathy belied the extent to which white people desperately needed and still need blacks in a subordinate status in order to sustain the myriad fictions of white, racial integrity.

This issue is identifying and analyzing the tremendous and growing gaps in income, wealth, and opportunity in this country. These disparities are not frequently mentioned by either major political party and, based on measures of public upset, they are not a matter of priority concern except as reflected by the sacrifices so many must make to pay for prescription drugs, by the poor quality of so many underfunded public schools, and by the lack of any health coverage for more than forty million people. The seriousness of these inequities becomes incomprehensible given the great wealth of this nation. And yet there is little challenge to the economic system that favors so few and burdens so many.

The evidence of a similar political apathy is painfully apparent in the wake of the Florida vote recount debacle that ended the presidential campaign of 2000. Law teachers across the political spectrum have expressed dismay over the Supreme Court's expropriation of the Presidential election.³ A statement, signed by 660 law professors published in a full page ad in *The New York Times*, asserted that the five judge majority were "acting as 'political proponents for candidate Bush, not as judges.'"⁴ Yale professor, Bruce Ackerman, agrees.⁵ Given his status in the elite of constitutional law scholars, his condemnation of the court is particularly noteworthy. Agreeing with dissenting Justice John Paul Stevens, a jurist noted for his sobriety, that *Bush v. Gore* has shaken "the

2. See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 295-310, 344-45, 380-81, 386 (1975).

3. See *Bush v. Gore*, 121 S. Ct. 525 (2000).

4. David Abel, *Bush v. Gore Case Compels Scholars to Alter Courses at U.S. Law Schools*, BOSTON GLOBE, Feb. 13, 2001, at A1.

5. See Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48.

Nation's confidence in the judge as an impartial guardian of the rule of law,"⁶ Ackerman writes:

We are not dealing with the normal disagreement on principle that attends every important Supreme Court decision. Justice Stevens is saying that the majority's decision to halt the Florida recount is a blatantly partisan act, without any legal basis whatsoever. . . .

After a careful study of the Court's opinion, I have reluctantly concluded that Stevens is right. I say reluctantly because this view goes against the grain of my entire academic career, which has been one long struggle against the slogan that law is just politics.⁷

The political significance of these developments has shifted attention from an underlying question of relevance to the discussion of the contemporary role of race in understanding wealth and inequality. Why did so many middle-class and working-class voters, the great majority of them white, vote for the Republican candidate given the party's rather obvious priority for protecting the already privileged?⁸ Many issues come to mind—a large tax cut favoring the wealthy, repealing the estate tax, favoring business over the environment, reforming health care, undermining social security—that should have the working class outraged instead of captivated.⁹

The fact is, of course, that both major-party candidates, beyond their rhetoric, had a right-leaning agenda in which there was hardly any mention of some of the most serious problems confronting the nation: opposition to the death penalty, the war on drugs, inadequate minimum wage, targeting drug companies for high cost of prescription drugs, and meaningful reform of election financing. Only Ralph Nader took a strong position on each of these issues.¹⁰

6. *Bush*, 121 S. Ct. at 542 (Stevens, J., dissenting).

7. *Id.*

8. In races across the country, Bush took more than half the white vote. See Richard Benedetto & Jessica Lee, *Race Reflected Political Divisions*, USA TODAY, Nov. 8, 2000, at 8A (noting that most whites voted for Bush, while nine out of ten blacks voted for Gore); Jim Galloway, *Georgia's Decision: Rural Areas Deliver Bush Victory*, ATLANTA J. & CONST., Nov. 8, 2000, at 7E; Laura Meckler, *Divided America Went to the Polls*, AP ONLINE, Nov. 8, 2000, available at 2000 WL 29039203; Terry Spencer, *Bush, Gore Kept Parties' Traditional Bases in Florida*, AP NEWSWIRE, Nov. 8, 2000.

9. See Janet Hook, *Drive to Kill Estate Taxes Loses Steam*, L.A. TIMES, Feb. 15, 2001, at A1; Judy Keen, *How the White House Was Won . . . and Lost*, USA TODAY, Nov. 8, 2000, at 15A.

10. See Megan Garvey, *Campaign 2000: Nader's Different, He Says, and He's Happy to Explain Just How*, L.A. TIMES, Nov. 3, 2000, at A26; Associated Press, *Views of Nader and Buchanan*, AP ONLINE, Nov. 1, 2000, available at 2000 WL 29036695; see also Gary Maveal, *At the Core, Nader's Issues Have a Broadbased Appeal*, DETROIT NEWS, Nov. 7, 2000, at 11; (noting wide-spread Nader support among political centrists); Larua Meckler, *A Look at How America Voted*, AP ONLINE, Nov. 7, 2000, available at 2000 WL 29038794 (stating about half of the Nader voters said they would have voted for Gore in a two-way race while about one in three would not have voted).

And yet, I doubt that very many people would dispute that the Republican vote by working class whites was based in substantial part on the belief that the party would better protect them against inroads by minorities. And why not? While feigning interest in black voters, the Republican Party has come to power by parlaying the willingness of whites to blame blacks for the nation's ills and their own anxieties. From the message Reagan sent to whites by opening his campaign for the presidency with a speech in Philadelphia, Mississippi, near the site where the three civil rights workers were murdered,¹¹ to the elder Bush's use of the Willie Horton commercial,¹² Republicans have hidden their massive redistribution of the wealth upward by gleefully cutting social programs while assuring whites that they were restoring the racial balance through their opposition to affirmative action and their all but open hostility to black people.

"Yes, we know Bell, you have been telling us for a long time that racism is permanent in this country."¹³ True, but that statement has been more provocative than instructive. Racism is far more complex than blatant bigotry. It is far more

11. In 1980, Ronald Reagan opened his winning campaign tour speaking at a county fair in Philadelphia, Mississippi, a city known for its anti-integrationist posture. There, Reagan introduced the nation to his political philosophy of original intent, states rights and traditional deference to the principles of federalism. Not inconsequentially, it was in Philadelphia on June 16, 1964 that civil rights activists Michael Schwerner, Andrew Goodman and James Chaney fell victim to a white lynch mob claiming allegiance to "state's rights." Reagan's speech in Philadelphia followed his refusal to accept an invitation to speak at the annual convention of the NAACP. See Jamin B. Raskin, *Is There a Constitutional Right to Vote and Be Represented? The Case of the District of Columbia*, 48 AM. U. L. REV. 589, 675 (1999); see also FLORENCE MARS, WITNESS IN PHILADELPHIA 235 (1977) (discussing the lynching of Schwerner, Goodman and Chaney); Douglas E. Kneeland, *Reagan Campaigns at Mississippi Fair*, N.Y. TIMES, Aug. 4, 1980, at A11.

12. Professor Joseph E. Kennedy describes the Willie Horton controversy of the late eighties as "[p]erhaps the single most politically influential crime story of recent years." Joseph Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 887 (2000). Horton was a convicted first-degree murderer serving a life sentence without the possibility of parole when he was released on furlough by Massachusetts' governor Michael Dukakis. While out of prison, Horton raped, robbed, and terrorized a white suburban couple. His crimes made the furlough program a national issue during Dukakis' presidential bid in 1988. As the Republican candidate, George Bush ran anti-Dukakis commercials flashing Horton's mug shot to portray Dukakis as "soft on crime." Many commentators charged that by flashing the mug shot of an African-American man in connection with a crime story, the commercials appealed to America's deep seeded racial fears, thus contributing to Dukakis' ultimate defeat. See *id.*; KATHY RUSSELL ET AL., *THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS* 38 (1992) (suggesting that Bush intentionally chose to use Willie Horton in the ads because of the suspicion that blacks are more criminally dangerous); Dennis Love, *Black and White: Walking a Fine Line, What Does "Racism" Mean? And Can We Live with It in Our Midst?*, ARIZ. REPUBLIC, Nov. 25, 1990, at E1 (noting the popular perception that George Bush played on racial fears when he spotlighted Willie Horton in the television ads).

13. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992):.

like the supposed secret ingredient in Coca Cola, its presence felt more than tasted, its effect addictive while seemingly benign.

Race untangles the paradox of a nation built on free market economy and popular democracy. Here, I owe much to the work of Professor Amy Chua,¹⁴ who reminds us that political theorists and economists like Adam Smith, James Madison, and Thomas Babington Macauley warned that the combination simply could not work. Markets would produce enormous concentrations of wealth in the hands of a few, while democracy, by empowering the poor majority, would inevitably lead to convulsive acts of expropriation and confiscation.¹⁵

Professor Chua notes that this conflict has been more or less successfully negotiated throughout the developed world. "Defining the terms broadly, markets and democracy have coexisted quite healthily in the United States for two hundred years, and at least a dozen other developed countries," despite fears that the electoral powers of numbers would overwhelm the economic power of property, "'have remained continuously capitalist and democratic for the past half-century,'" a phenomenon Chua calls "one of the great surprises of modern history."¹⁶

In explanation, she points out that material redistribution, the most obvious accommodation made by the market economies of the developed world to the demands of the less well-off, consists of material compensation. In other words, the less prosperous have to a certain extent been "bought out," in part through market-generated material prosperity, but also in significant part through redistributive institutions of the kind that Jurgen Habermas refers to as "the welfare state compromise."¹⁷ To a surprising degree, the gaining of reasonable wages and benefits that enable the purchase of a home, car and other of the accoutrements of well-being, is sufficient to cause a number of working class people to identify with conservative economic and political policies that on even cursory examination will not further their interests.

I think Professor Chua would agree, though, that notwithstanding its tremendous wealth, there is less social support in this country than in other less wealthy countries. Providing one explanation, economist Robert L. Heilbroner suggested that in many more homogeneous countries with nothing like our wealth, advocates for social reform can point to the less well-off and argue that "there. but for the grace of God, go I."¹⁸ In America, where race is the major factor in our heterogeneity, opponents of reform argue that social programs

14. See generally Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287 (2000) [hereinafter Chua, *Paradox*]; see also Amy L. Chua, *Global Capitalism and Nationalist Backlash: The Link Between Markets and Ethnicity*, TRANSNAT'L L & CONTEMP. PROBS. 17 (1999); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998).

15. See Chua, *Paradox*, *supra* note 14, at 288.

16. *Id.* at 289 (internal citations omitted).

17. *Id.* at 295 (citations omitted).

18. See Robert Heilbroner, *The Roots of Social Neglect in the United States*, in *IS LAW DEAD?* 288, 296 (Eugene V. Rostow ed., 1971).

needed by many will help undeserving blacks.

Thus, while the persons who suffer most from social neglect in America are disproportionately black, the merging of the racial issue with that of neglect serves as a rationalization for the policies of inaction that have characterized so much of the American response to need. Programs to improve slums are seen by many as programs to "subsidize" blacks; proposals to improve prisons are seen as measures to coddle black criminals; and so on. All too often, the fear and resentment of blacks take precedence over the social problem itself. The result, unfortunately, is that the entire society suffers the results of a failure to correct social evils.

Another factor is that popular democracy, the theoretical challenge to a free enterprise economy has often been more heralded than a reality in this country; its potential seriously diminished by voter restrictions and restraints. Only a relative few could vote initially, and even after universal suffrage for white males, poll taxes, exclusion of paupers, and other restraints restricted the vote. Women until the early Twentieth Century could not vote at all. And the Fifteenth Amendment lay dormant for the better part of a century before its meaningful implementation enabled blacks and other people of color to vote in substantial numbers.

Despite the reforms led by civil rights advocates, the rhetoric of "one person, one vote,"¹⁹ is undermined by powerful economic interests that are able to exert disproportionate political influence to capture the state apparatus, using it to their advantage. Particularly in the South, the tactics used to deny the vote to blacks have often reduced the voting power of whites as well. In addition, the impact of wealth on campaigns and those who are elected is by even conservative estimates, tremendous.

Professor Chua sketched out additional market-compatible ideologies that seem to further explain the compatibility of free enterprise economies with popular democracy.²⁰ In this country there is the deeply held belief in upward mobility—the ideology holding that anyone can move up the economic ladder, as long as he or she is talented, hard-working, entrepreneurial and not too unlucky. This theme explored in countless novels and films is a key component of our secular religion with quite sacred overtones.

I would add that the upward mobility belief system is nourished by consumerism and the facilitation of the same by credit card debt that enables the shopping for and acquisition of things that it is hoped will satisfy the need for that which material possessions cannot provide. The substitution of buying things for real economic and political power literally consumes financial resources with debt while simultaneously disempowering any protest inclinations. The average American uses seven credit cards and owes over \$7000 on a continuing basis.²¹ Debt burdens of this size serve to discourage protests of

19. See *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

20. See Chua, *Paradox*, *supra* note 14, at 301-08.

21. See Mick Zawislak, *Credit Crazy Americans Expected to Put Record Amount of Holiday Spending on Plastic This Year*, CHIC. DAILY HERALD, Dec. 7, 2000, at 1.

conditions at either the workplace or in the streets.

Chua also mentions, among other factors, the spirit of self-reliance that holds a person's chief concern ought to be his "independence and particularly his ability to meet his own economic needs" and those of his family without outside assistance.²² This pioneer spirit is real but not very realistic. That is, the individual who thinks that only the undeserving accept welfare payments or food stamps has no problem deducting taxes and interest payments on his home mortgage, a government subsidy without which many Americans could not afford to purchase their homes.

Professor Chua supports my view that the ideology of racism in the United States and some other developed countries has been a "powerful force fracturing the 'lower class' and inducing large numbers of the less well-off majority to vote in defiance of what might be expected to be their rational economic self-interest."²³ In her view,

racism has likely operated in service of market capitalism in two different ways [R]acism (and the creation of a large racial underclass) has arguably made poor and working-class whites feel better about their relative plight, giving them a consoling sense of superiority and status vis-a-vis African Americans, Hispanic Americans, and other groups of color perceived (in many senses correctly) as "the sediment of the American stratificational order."²⁴

In addition, racism hinders the formation of political alliances between either poor and working-class whites or poor and working-class minorities, explaining the absence of a powerful working-class political party in the United States.²⁵ In this regard, race was a major facilitator of the acculturation and assimilation of European immigrants during late Nineteenth and early Twentieth Century. Horribly exploited by the mine and factory owners for whom they toiled long hours under brutal conditions for subsistence wages, the shared feeling of superiority to blacks was one of the few things that united them. The blackface and racially derogatory minstrel shows of that period helped immigrants acculturate and assimilate by inculcating a nationalism whose common theme was the disparagement and disadvantaging of blacks, rather than uniting across racial lines to resist the exploitation and deprivation that, then as now, does not respect any color line.²⁶

This history serves as a guide to understanding the present.²⁷ The ideology of whiteness continues to oppress whites as well as blacks. Now, as throughout

22. Chua, *Paradox*, *supra* note 14, at 303.

23. *Id.* at 305.

24. *Id.* at 306 (citations omitted).

25. *See id.*

26. *See, e.g.,* KEN EMERSON, DOO DAH! STEPHEN FOSTER AND THE RISE OF AMERICAN POPULAR CULTURE (1997).

27. *See* DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991).

the American experience, it is employed to make whites settle for despair in politics and anguish in the daily grind of life. Somehow, they link the facts that both a majority of America's population is white and that most power positions are held by whites with a sense that, as whites, they are privileged and entitled to preference over people of color. Over time, these views have solidified into a kind of property in whiteness. The law recognizes and protects this property right based on color, like any other property.

Here, where property is viewed as a measure of worth, many whites—with relatively little property of a traditional kind (e.g., money, securities, land)—view their whiteness as a property right.²⁸ Professor Cheryl Harris asserts:

[T]he valorization of whiteness as treasured property [takes place] in a society structured on racial caste. In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law.²⁹

That political advantage over blacks, though, makes it difficult for whites to identify with blacks even on matters that transcend skin color. To give continued meaning to their whiteness, whites are drawn to identify with whites at the top of the economic pile, not with blacks with whom—save color—they have so much in common. It is for these reasons that racism may not be something that can be overcome and may be a permanent part of the American social structure.

The barriers to moving beyond reliance on an out group for social stability are monumental in a nation where whites of widely divergent stations are able to make common cause through their unspoken pact to keep blacks on the bottom. No other aspect of social functioning has retained its viability and its value to general stability from the very beginning of the American experience down to the present day. Because of this fixation, I agree with Professor Jennifer Hochschild's assessment that racism is not an anomaly, but a crucial component of liberal democracy in this country.³⁰ The two are historically, even inherently reinforcing. In effect, the apparent anomaly is an actual symbiosis.

The extreme inequality of property and wealth in America is the direct result of the historic and continuing willingness of a great many, perhaps most, white people to identify with and attempt to emulate those at the top of the economic

28. See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); JANE LAZARRE, *BEYOND THE WHITENESS OF WHITENESS: MEMOIR OF A WHITE MOTHER OF BLACK SONS* (1996); IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992); ERIC J. SUNDQUIST, *TO WAKE THE NATIONS: RACE IN THE MAKING OF AMERICAN LITERATURE* (1993); HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS* (1994).

29. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993).

30. See generally JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* (1984).

heap while comforting their likely permanent lowly state by disidentifying and refusing to join with blacks and other people of color.

This may not be a curable defect in our societal structure. Rather, it is likely a key component in the stability of a nation built on the seemingly contradictory standards of a free market economy, where wealth percolates to the top, and popular democracy, where the universality of voting should serve as a continuing challenge to the wealthy.

And that is what the young Buddy tried to tell the older men back in Mississippi.

Sure, we whites kin have what we want long as what we want's is drinkin' beer in the heat and dust 'round a two-pump station out in the country. That, and keepin' niggers down. None of us got much of nothin' worthwhile. Meantime, the fat cats runnin' the companies and gettin' themselves elected to high office livin' better 'n we ever dream. When we goin' to get smart?³¹

There is some positive news. The economic and political role of whiteness is now being identified and challenged by a host of writers and in a growing number of courses and workshops. Enlightening white people as to the real benefits and the great cost of their property in whiteness will require a herculean task that, in substantial part, must be undertaken by knowledgeable whites.³²

Its success, though, would pose a serious threat to the inequality of wealth and property which, as much as we would like to eliminate the horrific disparities, may be the major component in the nation's stability. Social reforms, though, usually lead to the revelation of new problems, new challenges. That fact should spur, not discourage, our efforts to recognize the injustices before us now, try to correct them, and hope that those who follow us will do the same.

31. BELL, *supra* note 1, at 108.

32. See, e.g., BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? (1997).

PROMOTING EQUITABLE DEVELOPMENT

ANGELA GLOVER BLACKWELL*

INTRODUCTION

Advocates for opportunity and inclusion face more challenges and possibilities than they have within recent memory. Exacerbated by an accelerating decline of the nation's cities, inequality seems to be further entrenched. However, rapidly changing economic and social conditions provide opportunities to address problems in innovative ways. At a time when government has reduced its active commitment to advancing social justice, new stakeholders are emerging as partners to tackle urban problems. In general, there is less interest in talking about racism but a growing commitment to diversity and a budding interest in alleviating poverty. These times demand new ways of thinking about inequity as well as new mechanisms for addressing it. Instead of settling for piecemeal gains, a comprehensive, long-term approach is needed. The local level is witnessing a groundswell of activity that reflects this type of thinking, providing the necessary leadership in the coming period.

I. THE CONTEXT

These are times of rapid change. Demographic shifts are altering the complexion of both cities and suburbs with racial and ethnic diversity on the rise.¹ This is more striking in urban areas, many of which are increasingly becoming "majority minority." These changing demographics are forcing institutions to adjust and are creating additional challenges for community-serving organizations. Some urban communities are experiencing reinvestment, while others languish. However, this reinvestment is almost always market driven with no inherent points of community intervention. Hence, the risk of displacement is high for current residents as their neighborhoods change. There is more of a focus on local, rather than national, responses to problems, making it more difficult to set forth proactive responses and visions. Furthermore, political power is increasingly concentrated in the suburbs, challenging neighborhood activists to expand their scope of involvement.

Meanwhile, inequity persists. Over the past quarter century, low-income Americans have lost significant ground in relation to the country's wealthy.²

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1. See U.S. DEP'T OF HOUSING AND URBAN DEV., *THE STATE OF THE CITIES 2000: MEGAFORCES SHAPING THE FUTURE OF THE NATION'S CITIES* 31-32 (2000) [hereinafter *STATE OF THE CITIES*].

2. See JARED BERNSTEIN ET AL., *CTR. FOR BUDGET AND POLICY PRIORITIES, ECON. POLICY INST., PULLING APART: A STATE-BY-STATE ANALYSIS OF INCOME TRENDS* 5-20 (2000). From 1978

Despite an unprecedented period of economic expansion during the past decade,³ the income gap continues to grow.⁴ This trend disproportionately impacts members of minority groups, even though, as a whole, they made some tangible gains in the late 1990s.⁵ While there is a general sense of optimism among African Americans⁶ brought on by the fact that economic life for some has never been better,⁷ they continue to lag behind their white counterparts in all important economic measures, including wealth accumulation.⁸ Moreover, Asians⁹ and Latinos¹⁰ are far more likely to live beneath the poverty line than white Americans.

This wealth gap is exacerbated by current patterns of growth that are having a detrimental impact on low-income communities of color across the country. Characterized by the unplanned, continuous spread of residential and commercial development to the ever-expanding fringes of metropolitan areas, "sprawl" fosters the isolation of urban areas where minority and low-income populations are concentrated.¹¹ The resulting neglect is threatening the viability of the urban

to 1998, after adjustment for inflation, the average income of the lowest-income fifth of families fell by over six percent, the average for the middle fifth of families grew by about five percent, and the average income of the highest fifth grew by over thirty percent. *See id.*

3. While acknowledging that there has been an economic boom, many observers are suggesting that a recession is on the horizon. *See, e.g., When the Economy Slows*, N.Y. TIMES, Dec. 20, 2000, at A34; Adam Cohen, *Economic Slowdown: This Time It's Different*, TIME, Jan. 8, 2001, at 18. If that is the case, lower-income families will be hit the soonest and hardest. *See* Daniel McGinn & Keith Naughton, *How Safe Is Your Job?*, NEWSWEEK, Feb. 5, 2001, at 36.

4. *See* BERNSTEIN ET AL., *supra* note 2, at 21-32. "The average income of the lowest-income families grew by less than one percent from the late 1980s to the late 1990s, a statistically insignificant amount. The average real income of middle-income families grew by less than two percent, while the average real income of high-income families grew by 15 percent." *Id.* at vii.

5. *See* Margaret C. Simms, *Trendletter: Progress in Wealth Accumulation*, FOCUS, Mar. 2000, at 3. Between 1995 and 1998, minority families increased the value of their financial assets (stocks, mutual funds and retirement accounts, for example) as well as the value of their non-financial assets (homes, cars and businesses) at higher rates than whites. *See id.*

6. *See* Ellis Cose et al., *The Good News About Black America*, NEWSWEEK, June 7, 1999, at 35.

7. *See id.* at 35.

8. *See id.* at 40. *See generally* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 232-57 (1997).

9. Based on 1998 figures, about thirteen percent of all Asian Americans lived under the poverty line compared with eight percent of whites. *See* KAREN HUMES & JESSE MCKINNON, U.S. CENSUS BUREAU, *THE ASIAN AND PACIFIC ISLANDER POPULATION IN THE UNITED STATES, CURRENT POPULATION REPORTS* 3 (2000).

10. Based on 1998 figures, about 26 percent of Latinos live beneath the poverty level. *See* ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, *THE HISPANIC POPULATION IN THE UNITED STATES, CURRENT POPULATION REPORTS* 3 (2000).

11. *See* Bruce J. Katz, *Reviving Cities: Think Metropolitan* (June 1998), available at <http://www.brookings.org/comm/policybriefs/pb033/pb33.htm>. The author states:

center.¹²

Significant barriers—such as the lack of affordable housing in the suburbs¹³ and a lack of transportation to them¹⁴—conspire to keep low-income people isolated from opportunity. This is particularly true for members of minority groups, who still face various forms of housing discrimination that prevent them from moving out of the urban core.¹⁵ Increasingly, life chances are determined by where people live. As services such as quality schools and well-paying, entry-level employment opportunities move away from urban centers, those who most need them do not have access. This fosters a cycle that is far too difficult for low-income people or families to break individually.

Public policy has been the primary force to encourage and support the movement away from urban areas to the suburbs. Beginning with the National Housing Act of 1934, which insured low-interest mortgage loans to middle-class households,¹⁶ federal laws have served to undermine the health of the urban

Caught on an unlevel playing field, cities and older suburbs find it difficult to compete with these new suburbs for businesses and middle-class residents. As companies and families move out, the tax bases of cities and older suburbs shrink, leaving these places without the financial wherewithal to grapple with concentrated minority poverty, joblessness, family fragmentation and failing schools.

Id.

12. See Bruce Katz, *Enough of the Small Stuff!: Toward a New Urban Agenda*, BROOKINGS REV., Summer 2000, at 4-9, available at <http://www.brook.edu/press/review/summer2000/katz.htm>. See also Press Release, U.S. Dep't of Housing & Urban Dev., *Now Is the Time: Places Left Behind in the New Economy* (April 1999), available at <http://www.hud.gov/pressrel/nowtime.html>.

13. See LEAH KALINOSKY & KATHY DESMOND, NAT'L NEIGHBORHOOD COALITION, SMART GROWTH, BETTER NEIGHBORHOODS: COMMUNITIES LEADING THE WAY 63-74 (2000). For example, the efforts of the Alliance for Metropolitan Stability succeeded in getting inclusionary zoning policies passed in Minnesota in 1999. The legislation provides incentives for developers to create affordable housing. Two-thirds of jobs in the Twin Cities region are created in the suburbs where the vacancy rate for rental apartments is two percent. See *id.*

14. See Rich Stolz, *Race, Poverty & Transportation*, POVERTY & RACE, Mar.-Apr. 2000, at 1. "Transportation is a fundamental, yet often overlooked, element in the struggle for equality of opportunity. Access to reliable means of transportation impacts quality of life, financial security and freedom of movement." *Id.* For example, the experiences of the Bay Area Transportation and Land Use Coalition successfully fought proposed cuts in public transportation because it would restrict the ability of low-income residents to find and maintain employment. See KALINOSKY & DESMOND, *supra* note 13, at 3-14.

15. See Robert D. Bullard et al., *Closed Doors: Persistent Barriers to Fair Housing*, in SPRAWL CITY: RACE, POLITICS AND PLANNING IN ATLANTA 89-109 (Robert D. Bullard et al. eds., 2000).

16. "In and of itself, such a program inherently favored newer suburbs, with their predominantly single-family homes, over older cities, with their much higher proportions of rental housing." DAVID RUSK, *INSIDE GAME, OUTSIDE GAME* 86 (1999).

space.¹⁷ This is not just a political problem on the national level. State and local practices have, intentionally or not, contributed to this dilemma. Suburban governments committed public monies to lure businesses, and therefore jobs, out of the inner city.¹⁸ More commonly, these incentives come in the form of the tax breaks from money that suburban governments have in their arsenal.¹⁹

Since the 1950s, policy-makers and researchers have expressed concern about suburban growth patterns and how they impact the inner city.²⁰ More recently, under the banner of "smart growth," there is increasing momentum to influence development in order to reduce the negative impact of unfettered low-density, automobile-dependent sprawl, especially regarding issues like land-use and smog.²¹ These efforts have lodged themselves in the public consciousness and have gained widespread support.²² The anti-sprawl sentiment is broadening the base of potential supporters for smart growth coalitions in communities across the country. These discussions are bringing new stakeholders—such as urban neighborhood activists and suburban legislators—into the dialogue about sustainable development and smart growth. It is also an opportunity for new alliances across old divides of race and interests, particularly between those focused on environmental issues and those of low-income community residents. PolicyLink is part of a growing chorus of actors who believe that discussions about growth and development are incomplete without addressing issues of racial

17. *See id.* This has not been a conspiracy. "It would have been hard to devise consciously a more coherent set of national policies to undermine our cities than those that the federal government adopted piecemeal." *Id.*

18. *See* Good Jobs First, *Another Way Sprawl Happens: Economic Development Subsidies in a Twin Cities Suburb* (Jan. 2000), at <http://www.ctj.org/itep/anoka.htm>. This study analyzes twenty-nine companies with 1600 jobs that relocated from the Twin Cities to a 300-acre industrial park in the distant suburb of Anoka which provided free land for the project. The net result was that the jobs became inaccessible to the region's largest concentration of people of color and away from pockets of poverty. *See id.*

19. *See* Greg LeRoy, *Race, Poverty & Corporate Welfare*, POVERTY & RACE, Mar.-Apr. 2000, at 3-4 (2000) (discussing a 1995 *Kansas City Star* series examining the practice of wealthy suburbs luring businesses out of urban centers with tax breaks, the very kind of incentives originally meant to aid urban areas, and a 1999 *Milwaukee Journal Sentinel* series citing a mutual fund company in suburban Menomonee Falls that received a \$3 million tax credit).

20. *See* MANUEL PASTOR, JR. ET AL., REGIONS THAT WORK: HOW CITIES AND SUBURBS CAN GROW TOGETHER 263 (2000) (reframing the historic divide between cities and suburbs).

21. *See generally* Sierra Club, *Sprawl Costs Us All: How Your Taxes Fuel Suburban Sprawl* (2000), at <http://www.sierraclub.org/sprawl/report00.html>.

22. Seventy-two percent of the 240 ballot initiatives limiting urban sprawl and promoting "managed growth" in communities across the country were approved in the November 1998 election. *See* Discussion Paper from Phyllis Meyers, to the Brookings Institution (Center on Urban and Metropolitan Policy) (Jan. 1999) (on file with author). Between 1999 and 2000, thirty-seven governors mentioned sprawl in their State of the State addresses. *See* Keith Kloor, *Growing In, CITY LIMITS*, Nov. 2000, at 17.

inequity.²³

Public policy helped to produce this inequity, and public policy must help to alleviate it. The government should not be expected to act alone. New partnerships are already being explored to bring together the government, the private sector, and community-serving organizations.²⁴ The private sector is engaged because businesses realize that smart growth strategies can help create environments conducive to reaching consumer markets and labor pools that would otherwise be unavailable.²⁵ Community-building organizations have never been more poised to tackle complicated issues of growth and development.²⁶ Faith-based organizations can also be valuable partners.²⁷

23. See, e.g., Nat'l Ass'n of Housing & Redev. Officials, *Campaign 2000: A National Platform for Housing and Community Development* (Feb. 2000), available at <http://www.nahro.org/action/campaign2000/000503.html> (describing a collaborative project of twenty-eight organizations to make sure that issues of affordable housing and urban economic development remain on the national agenda).

24. Since it defies the liberal-conservative duality, it is fashionable to label this type of thinking as a "third way." See David Dyssegaard Kallick, *Finding the Third Way*, INST. PUB. AFF., Nov. 29, 1998, at 1. The author warns that while it might be premature to talk about a third way since no leader or coherent program has emerged, the "elements of a viable alternative are not hard to locate, especially if you look below the radar of the mainstream media." *Id.* at 2.

25. See, e.g., The Westside Industrial Retention and Expansion Network (WIRE-Net), <http://www.wire-net.org>. This Cleveland membership organization of local industrial firms serves as an intermediary organization between firms, workers and the public sector. It serves a residential community of 120,000 and a manufacturing base of 700 firms, employing 30,000 people. Over the past eleven years, the organization has built its membership to more than 170 corporate members. WIRE-Net's regional economic reform strategy includes an industrial retention and expansion (IRE) program to redress the social effects of the de-industrialization of the local economy. This place-based strategy seeks to strengthen inner-city neighborhoods by building upon their economic competitive advantages.

26. There are three factors involved. First, beginning around 1988, the proliferation of geographic information systems software democratized access to the kind of hard data that once was, as a practical matter, exclusively available to governments and universities. Second, an emphasis on networking has brought local practitioners together on a regular basis, whether it is through the National Community Building Network, the Family Resource Coalition or the National Congress for Community Economic Development. For example, the National Community Building Network has grown from sixteen organizations to over 700. Third, as the policy focus has shifted to the local level away from a national focus, experienced organizers, activists and advocates are showing a preference for putting their energies into work at the community level. All of these factors have made community-building organizations more powerful and more dynamic.

27. See RUSK, *supra* note 16, at 333. More than fifteen percent of community development organizations in the United States are faith-based. See Brian Siebenlist, *The Role of Faith-Based Organizations in Smart Growth and Regionalism*, in KALINOSKY & DESMOND, *supra* note 13, at 113-14 ("[F]aith-based organizations have a base of values that gives them moral suasion. As a result, they enjoy tremendous credibility in public dialogue and are successful at community organizing. They also have a unique ability to tap into people's inner commitment to social

II. THE CHALLENGE

Given this context, the biggest challenge is developing and implementing strategies that foster equitable development. Equitable development includes policies and practices to promote and manage regional economic growth in a way that maximizes benefits for residents of low-income communities of color throughout metropolitan regions. Equitable development has two key dimensions. First, *equity must be at the forefront of the discussion*. Until recently, the concept of equity has been underrepresented because its most ardent champions have themselves been missing from dialogue about growth. Business and government players have long exercised their influence over development matters; organized, affluent suburban residents have asserted their interest; and environmental advocates are at the movement's center focused on "green" issues.²⁸ "The missing voice to date has been, and continues to be, the residents of low-income and minority neighborhoods."²⁹ Community-building organizations are often forced into a framework that focuses all of their attention on their neighborhoods without allowing them to take a step back to address big picture issues like region-wide economic development.

The reason why "the majority of neighborhood and community organizations have traditionally been inwardly focused" is that most "are underfunded, understaffed and overburdened as they strive to put out the daily fires all around them while also working to rebuild community block by block. They have little time or energy to dedicate to problems that seem not to directly affect their immediate interests."³⁰ Only very rarely does a single organization represent any given neighborhood as a collective whole, so that "it is difficult for planners and policy-makers to know whom to consult on matters relating to regional growth as it affects neighborhoods."³¹

There are attitudinal issues that flow from the conditions in which these groups operate. The majority of groups operating in poor, urban communities are service providers and community developers. The service providers traditionally measure the impact of their work either in terms of how many clients are served or, at best, whether individual lives are improved. Community developers measure their impact by physical improvement in the neighborhood. Neither group has its primary focus on how people are doing in relation to the larger society. Adopting an equity agenda forces discussions on the performance of inner-city schools versus suburban schools, regional development versus urban development, and quality of environment in cities versus the quality outside. Equity is a social yardstick that measures progress of a group in relation to the

responsibility . . .").

28. See NAT'L NEIGHBORHOOD COALITION, NEIGHBORHOODS, REGIONS AND SMART GROWTH 3 (1999) (unpublished project description on file with author).

29. *Id.*

30. *Id.*

31. *Id.* at 4.

whole. Equity considerations encourage more comprehensive thinking that looks beyond the neighborhood to regional resources and builds coalitions across constituent groups.

The second dimension of equitable development that deserves emphasis is the *blending of people and place strategies*. People strategies are investments in human capital, such as workforce development and safety net programs. Place strategies revolve around bolstering or safeguarding the physical infrastructure, the types of activities implicated by transportation or environmental policy. When these strategies are pursued separately they can result in undesirable consequences.

Workforce development and transportation policies are inexorably linked. If workers are being trained for entry-level jobs, but they have no way to get to those jobs, then there is a spatial mismatch. Today, two-thirds of new jobs are located in the suburbs and “[m]ore than half of these new jobs are not accessible by public transportation . . . [and] 94 percent of welfare recipients do not have cars.”³² This disconnect has frustrated the efforts to move people off of public assistance since the passage of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act.³³ Furthermore, this spatial mismatch can “hamper a metropolitan area’s ability to reduce unemployment and restore economic health to central city neighborhoods. It can also affect the economic health of suburbs, whose employers may be struggling to find entry-level workers.”³⁴ In addition, there are social costs that flow from the additional strain on low-income families when members experience increasingly difficult commutes to jobs that are inaccessible to public transportation.³⁵ Blending people and place strategies in this situation calls for an integrated approach to inner-city communities involving both job training as well as equitable transportation policies.³⁶

32. CTR. FOR CMTY. CHANGE, *Transportation*, at <http://www.communitychange.org/> (last visited May 10, 2001).

33. 42 U.S.C. §§ 607-619 (2000). In a survey of twenty-three large cities, two-thirds had welfare caseloads declining at a slower rate than their states as a whole. See Bruce Katz & Kate Carnevale, *The State of Welfare Caseloads in America’s Cities* (May 1998) (unpublished paper), in Margaret Pugh, *Barriers to Work: The Spatial Divide Between Jobs and Welfare Recipients in Metropolitan Areas*, at 6 (Sept. 1998) (unpublished paper) (on file with author).

34. Pugh, *supra* note 33, at 6.

35. See *id.* at 4-5.

36. The Campaign for Sustainable Milwaukee is an advocacy organization composed of more than 200 community, religious, labor and business organizations. Since winning the passage of the Living Wage Ordinance, which stipulates a minimum wage of \$7.70 for the City and County of Milwaukee, Sustainable Milwaukee has focused on two priorities: workforce development and transit for employment access. The Campaign has

worked with the City Council to get the state to redirect its allocated Intermodal Surface Transportation Efficiency Act (ISTEA) funds on a light rail system for Milwaukee, more buses, and some road improvements. However, it was opposed by suburban communities which want widened highways with more access ramps and HOV lanes.

At the present time, many of America's central cities are undergoing a high level of real estate investment and appreciation in neighborhoods that were overlooked for decades by the private market and in which many public investments were ineffective. The new investment is revitalizing many areas, but it is also leading to serious problems for lower income residents and long-standing merchants who are displaced by higher income residents and upscale commercial establishments. Although most gentrification is the result of independent private investment decisions, it is more complicated than that because gentrification can also be an unintended result of policies around land use, housing, and lending. Gentrification arises, or is not managed and mitigated, in part because place strategies are implemented in the absence of people strategies. Looking to increase tax revenues and reduce poverty in central cities, public leaders aggressively encourage investment in low-income communities. When these programs work, they attract commercial and residential investment to these neighborhoods.³⁷ However, the "good news [about the economy] is also producing negative results for many communities"³⁸ because rapid investment and appreciation threaten the stability of low-income residents due to rising housing costs.³⁹ Missing here is a combination of place and people strategies that would ensure a pool of affordable housing along with job and wealth-building opportunities for residents.

Focusing on people-oriented social justice and civil rights issues separately from the place-oriented environmental issue may lead to decisions that are good for the environment but not good for people, often inciting charges of environmental racism. When civil rights and social justice work are combined, however, with environmental concerns, the end result is environmental justice. Current patterns of growth in fact call for solutions that combine environmental and social justice issues.⁴⁰ The Vermont legislature has found that it must address issues of housing and issues of conservation at the same time. The first three acts of the Vermont Housing and Conservation Trust Fund consisted of

In a compromise both provisions were eliminated from the state budget To address [job access], Sustainable Milwaukee will open a workers' center which will match low-income people with training programs for jobs in printing, construction, and manufacturing.

Campaigning for a Sustainable Milwaukee (Nov. 18, 1998), at http://www.sustainable.org/casestudies/wisconsin/wi_epa_milwaukee.html.

37. See STATE OF THE CITIES, *supra* note 1, at 33-39. "Federal programs such as Community Development Block Grants (CDBGs), Empowerment Zones/Enterprise Communities (EZs/ECs), Section 108 guaranteed loans, and the Economic Development Initiative (EDI) /Community Empowerment Fund (CEF) are bearing fruit in the economic turnaround of cities across the country." *Id.* at 35.

38. *Id.* at 35.

39. See MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES (2001).

40. See Memorandum from Carl Anthony, to the Conference on Health and Sustainable Communities (Dec. 1996) (on file with author).

preserving a dairy farm, a loon habitat, and a rental housing project at risk of being converted to market rate rentals.⁴¹ In Chicago, environmental clean up has directly created jobs, thereby making explicit the link between environmental concerns and what has been conventionally recognized as bread-and-butter issues.⁴²

There will be no sustainable solutions to the stifling patterns of growth experienced by this country's metropolitan areas unless the dialogue is framed by the goal of equity, and until policymakers blend people and place strategies.

III. PATHS TO ACHIEVING EQUITY

Widespread inequality has been a chief characteristic of the U.S. economy for so long that perhaps a certain amount of resignation has taken hold. Conventional wisdom indicates there is only so much society can do. It is simply not true that workable solutions to the problem of inequity are somehow unknowable. Elements of workable solutions exist all over the country and new ideas begin to emerge every day. Much of this wisdom is at the local level, where community-building organizations have an intimate feel for the contours of how inequality manifests itself in the daily lives of the people they serve. These local leaders are the country's national leaders. Their voices, their participation, and their guidance are needed to craft authentic, sustainable solutions.⁴³ These leaders are creating a new movement focused on equity. It blends people and place strategies and works in partnership with local residents and diverse stakeholders to promote equitable development.

Two areas in which new thinking has emerged about strategies to promote equity involve regional development and the economy. There is a growing consensus that equity outcomes cannot be achieved by focusing solely on inner-city communities. Approaches need to be analyzed from the larger regional level

41. See James M. Libby, Jr., *The Vermont Housing and Conservation Trust Fund: A Unique Approach to Affordable Housing*, 23 CLEARINGHOUSE REV. 1275 (1990).

At first, the housing advocates were fearful that affordable housing was being added because of its popular appeal and worried that conservationists, sometimes referred to as the 'green sneaker bunch,' would not be able to understand or address poverty and homelessness. At the same time, the conservationists and farmers were afraid that the housing and low income advocates would be too radical and too dogmatic to join the coalition.

Id.

42. For example, Bethel New Life of Chicago, Illinois is an organization that trains welfare-to-work participants for living-wage jobs in the environmental field, including lead and asbestos removal, hazardous waste handling, site characterization, organic landscaping, toxic waste removal and demolition and salvaging. Bethel has also developed a career ladder for workers who apply their skills to thirty community brownfield sites, thus transforming liabilities into opportunities.

43. For a full discussion of community-building, see Angela Glover Blackwell & Raymond Colmenar, *Community-Building: From Local Wisdom to Public Policy*, 115 PUB. HEALTH REP. 161, 161-66 (2000).

and implemented from that perspective. At the same time, there is also growing recognition that new tools and strategies are needed to connect low-income residents to the economy. Community equity mechanisms are emerging that not only connect people to jobs but also help communities to build wealth.

IV. THE REGION

Regions, rather than cities or inner cities, are the arenas in which to address equitable development.⁴⁴ The emerging smart growth movement has provided a regional lens for analysis and action.⁴⁵ At the same time, the smart growth movement has had a tendency to minimize issues related to inequity. Aiming to promote the three E's of sustainable development—economy, environment and equity—the developers and environmentalists who have dominated the conversation have emphasized the first two. Therefore, smart growth discussions have centered on those issue areas that propelled them into the mainstream in the first place, including land use, environmental concerns and transportation. Few smart growth measures approved by voters are designed to address urban problems associated with sprawl,⁴⁶ and press coverage tends to favor the

44. Metropolitan areas are “the engines of the American economy They are complex organisms, each growing around several nodes of economic activities—central business districts, ‘edge cities,’ industrial areas, service clusters, and high-tech or commercial corridors.” Bruce Katz & Scott Bernstein, *The New Metropolitan Agenda*, BROOKINGS REV., Fall 1998, at 4. This does not represent a new idea but rather the reinvigoration of arguments made since the early twentieth century. In 1937, the National Resources Committee argued that the boundaries of the political city should be:

stretched to include its suburban and satellite industrial and residential colonies [because] no community in the democratic society can long remain a sound functioning organism, if those among its members who gained the greatest benefits from that, escape from most of the obligations communal life imposes, and if those who attain the least returns in the way of the necessities and amenities of life are left to bear the burden of civic responsibility and taxation.

NAT'L RES. COMM., OUR CITIES 68 (1937).

45. The interests of cities and their surrounding suburbs are so intertwined that they cannot be separated. See Antonio R. Villaraigosa, *America's Urban Agenda: A View from California*, BROOKINGS REV., Summer 2000, at 46, 49, available at <http://www.brook.edu/press/review/summer2000/villaraigosa.html>.

Our suburbs—from wealthy gated communities, to gritty blue-collar bungalow and industrial communities, to new housing tract developments on the urban fringe—are inexorably linked to the fate of nearby cities. In fact, many of the places we call suburbs are really small cities. They, too, confront serious problems: fiscal challenges, poverty, environmental concerns, crime, housing shortages, traffic congestion, ethnic tensions and struggling public schools.

Id. Neither can improve its lot without the other. See DAVID BOLLIER, HOW SMART GROWTH CAN STOP SPRAWL: A BRIEFING GUIDE FOR FUNDERS (1998).

46. See Meyers, *supra* note 22, at 2-3.

frustrations of suburbanites.⁴⁷ While disinvestment in central cities, unemployment, poverty, and crime have been acknowledged as effects of unmanaged growth in recent years, in few cases have they been integral pieces of smart growth dialogue. In fact, some of the policies adopted under the banner of “smart growth” have been harmful to low-income people.⁴⁸

Equitable development requires the promotion and management of economic growth that maximizes benefits for residents of low-income communities throughout metropolitan regions and assures their voice in the development process. First and foremost, it is essential to ensure that existing affordable housing is preserved⁴⁹ and that additional affordable housing is built as part of large-scale regional housing development.⁵⁰ In achieving this goal, advocates must be prepared to take action in a number of arenas if they hope to affect the pool of affordable housing in a meaningful way. This requires action in a wide variety of political and policy-making settings.⁵¹ At other times, this requires building the housing directly⁵² or lending money to future low-income homeowners.⁵³ Currently, there are over 130 housing trust funds operating throughout the country that have aggregated funds solely for the creation of affordable housing.⁵⁴

47. See, e.g., Judith Bell & Heather McCulloch, *Stalled in Paradise*, AM. PROSPECT, July 17, 2000, at 6.

48. See Andrew LePage, *Down Side to Fixing up Cities: 'Smart Growth' Policies May Hurt Poor Residents*, SACRAMENTO BEE, Sept. 25, 2000, at D1.

49. See, e.g., Libby, *supra* note 41.

50. Since 1973, Montgomery County, Maryland has required that fifteen percent of new housing be set aside for low and moderate-income families and residents. See RUSK, *supra* note 16, at 184. A number of communities have mandatory mixed-income laws, but what sets Montgomery County apart is that it does not allow developers to pay a fee or build senior housing to escape the requirement, practices that are widespread in other areas. See *id.* at 327.

51. The East Bay Housing Organization (EBHO) mobilizes people to attend public hearings to ensure that plans and proposals considered by the cities in the Oakland metropolitan area address the needs of their low- and moderate-income constituents. Additionally, EBHO regularly organizes tours of affordable housing projects to dispel myths that affordable housing is unattractive or detrimental to neighborhoods. Meanwhile, in the neighboring suburbs, the Silicon Valley Manufacturing Group has organized to counter the opposition of residents who are resisting the spread of affordable housing throughout the region. See POLICYLINK, BRIEFING BOOK: STRATEGIES AND EXAMPLES OF COMMUNITY-BASED APPROACHES TO EQUITY AND SMART GROWTH—A WORKING DOCUMENT 45-46 (2000) [hereinafter POLICYLINK, BRIEFING BOOK].

52. America's more than 3600 community development corporations have produced thirty percent of the country's assisted housing. See Nat'l Ass'n of Housing and Redev. Officials, *supra* note 23, at 18.

53. The location efficient mortgage (LEM), for instance, helps give low-income buyers additional credit when they move to high-density areas with well-established public transportation. The LEM is being tested in Chicago, Seattle, the San Francisco Bay Area and Los Angeles. See POLICYLINK, BRIEFING BOOK, *supra* note 51, at 49-50.

54. As an example, a joint venture between the Silicon Valley Manufacturing Group and the

Integral to a region-wide approach are strategies that seek to minimize the displacement of low-income people from neighborhoods that are experiencing revitalization. To assist in this venture, PolicyLink has launched a "Beyond Gentrification Toolkit."⁵⁵ The toolkit is primarily Web-based and highlights state and local public policy strategies that local community leaders can implement to manage new investments and city and regional revitalization to the benefit of current residents. The toolkit will help community-building organizations and municipal agencies: assess the current state of investments and ownership in their communities; review a range of policy options and practices that, applied selectively, can combine to best manage new investment with equity outcomes; include advocacy strategies that can help communities achieve new policies; and identify revenue streams that can operationalize their goals.

The toolkit describes each policy strategy and how each can be used to generate community economic benefits, provide opportunities for communities to analyze and advocate for each policy, and showcase the work of communities that have employed each of these interventions. Additional toolkit information will include capacity-building materials that provide step-by-step details about how to understand the decision-making processes of local, state, and national policymaking bodies, including commissions and regulators.

Community control over land and the accompanying housing represents the most promising avenue to guaranteeing long-term affordability of housing. Furthermore, community land trusts allow local actors to avoid many negative impacts of speculation and rising property values by isolating land from market forces. Again, the goal of equitable development is not to restrict the pool of available property. Opportunities for housing can be broadened while resale controls such as limited-equity housing cooperatives, non-profit ownership and deed restrictions can help ensure the permanent affordability of a portion of the housing stock.

Strategies for property acquisition can include pressuring local governments to donate (or sell at a nominal price) city-owned land and abandoned property. The Chicago Abandoned Property Program, for example, allows the city to transfer such properties to individuals or groups interested in affordable housing development.⁵⁶ Philadelphia is now in "the forefront of policy analysis and action on the issue of vacant property" due to a series of reports by both government and independent bodies analyzing vacancy conditions and various

City of San Jose has raised \$10 million toward a goal of \$20 million to help 5000 families, many of whom are currently homeless, purchase their first home.

55. See PolicyLink, *Beyond Gentrification Toolkit: Tools for Equitable Development*, available at <http://www.policylink.org/gentrification> (last visited May 31, 2001).

56. Under this program, the Humboldt Park Empowerment Partnership, a coalition of eighty organizations addressing such issues as job training, youth mentoring and affordable homeownership, applied for and, after an extensive organizing campaign, ultimately received eminent domain authority over 159 parcels of land. Groundbreaking began on the first homes last spring. Merging people and place strategies, the Partnership employs local residents on all of its projects.

possible approaches to dealing with the problem.⁵⁷ As a result, Mayor John Street, in his first few months of office, announced a \$250 million commitment to reduce urban blight. However, many are watching closely to see if this effort is successful. The fact that the city has divided responsibility for vacant property among fifteen public agencies could make decision-making cumbersome.

Transportation is also an issue that calls for regional thinking, especially as it relates to access to suburban employment opportunities for the working poor.⁵⁸ There is a growing awareness of the need to look beyond the mere convenience of the suburban commuter when determining transportation policy and spending.⁵⁹ In Baltimore, the Citizen's Planning and Housing Association successfully stopped a \$200 million outer-suburban bypass highway plan that failed to address equity issues. The sixty-year-old organization is leading a fight to redirect those funds, along with another \$800 million to be spent locally on transportation, toward public transportation and supporting a larger agenda to ensure the long-term vitality of the Baltimore region. Similarly, the ten-county Atlanta region's public transit system only serves two of those counties, but in 1999, Georgia's newly elected governor, Roy Barnes, created the Georgia Regional Transportation Authority, a superagency charged with addressing sprawl-related problems.⁶⁰

V. THE ECONOMY

The most direct means for addressing inequity is by improving the income and wealth of those at the low end of the economic spectrum and assuring that economic decisions are made in ways that benefit all. Therefore, strategies must be identified that do not simply focus on services for the poor. Services are important but insufficient. Rather, services need to be integrated with strategies that connect poor people to good jobs and assets. Employment opportunities that sustain and nurture families and communities are necessary, but are not enough. Inner-city residents need the chance to accumulate wealth, so that they have a stake in the economy.

When public investments are used, the question of who benefits must always be asked. In 1991, Bay Area Rapid Transit (BART) had plans to develop a ten-acre lot into a parking structure at the Fruitvale station in order to accommodate additional cars for commuters making their way into San Francisco each

57. Mark Alan Hughes, *Dirt into Dollars: Converting Vacant Land into Valuable Development*, BROOKINGSREV., Summer 2000, at 34, 36, available at <http://www.brook.edu/press/review/summer2000/hughes.htm>.

58. In 1990, seventy-eight percent of the white working poor and sixty percent of the black working poor commuted from suburb to suburb or "reverse commuted" from city to suburb. See Katherine M. O'Reagan & John M. Quigley, *Cars for the Poor*, ACCESS, Spring 1998, at 22.

59. U.S. transportation policies have "enable[d] people to live farther away from central city jobs, guaranteeing easy access to business districts without requiring people to live in them." F. KAID BENFIELD ET AL., ONCE THERE WERE GREENFIELDS 122 (1999).

60. See Bullard et al., *supra* note 15, at 15-16.

morning. With the leadership of the Unity Council, one of the area's oldest community-based institutions, the Fruitvale residents made it clear that they did not want all of the extra pollution from automobiles or the additional eyesore of a parking lot, just to have people pass through their community on the way to somewhere else. The Unity Council proposed an alternative plan for development that would create a transit village, designed to "revitalize the Fruitvale neighborhood, create and retain jobs for Fruitvale residents, reduce dependence on cars and the pollution it causes, and increase BART ridership."⁶¹ The Unity Council's efforts were successful and in September 1999, the Transit Village broke ground. When the project is complete, the Transit Village will include a senior center, child care center, health clinic and shopping facilities. BART has subsequently made transit-oriented development one of its priorities.

Public subsidies must also be held accountable. The potential for public subsidies to assist in equitable urban development is enormous, as the vast majority of subsidies are regularly given away. For example, a recent study found that many Minnesota corporations benefitting from economic development incentives pay very low wages.⁶² The Minnesota Alliance for Progressive Action subsequently won the passage of the 1999 Corporate Welfare Reform Act, which requires higher standards for subsidies, and a greater degree of public input and accountability. Nationwide, only seventeen states even require audits of publicly subsidized companies.⁶³ In those states that do require audits, the data collection is so poor that it is impossible to evaluate whether or not the public subsidies in question actually produce any results.⁶⁴

Whenever new construction starts in any neighborhood, local residents should immediately ask, "Who benefits?" PolicyLink is engaged in a study of regional and statewide public subsidies in California. The goal is to raise the floor and set standards for the types of development that merit public assistance.⁶⁵

Private money must also be brought into the field of economic development more aggressively. Working with partners, PolicyLink is developing a national model of leveraging private markets to meet the needs and priorities of low-income communities throughout metropolitan regions. The Community Capital

61. Unity Council, *The Fruitvale BART Transit Village Initiative* (Oct. 1999) (unpublished manuscript) (on file with author).

62. See GOOD JOBS FIRST, *ECONOMIC DEVELOPMENT IN MINNESOTA: HIGH SUBSIDIES, LOW WAGES, ABSENT STANDARDS* (1999), available at <http://www.goodjobsfirst.org>.

63. See SARAH HINKLEY ET AL., *GOOD JOBS FIRST, MINDING THE CANDY STORE: STATE AUDITS OF ECONOMIC DEVELOPMENT 1* (2000), available at <http://www.goodjobsfirst.org>.

64. See *id.*

65. At a minimum, economic development must be environmentally sound and produce tangible community benefits, including quality jobs accessible to neighborhood residents. PolicyLink is doing this work in partnership with regional anchors in San Diego, Los Angeles and the San Francisco Bay Area. The anchor organizations include: The Center on Policy Initiatives (San Diego); The Los Angeles Alliance for a New Economy; East Bay Alliance for Sustainable Development; and Working Partnerships USA (San Jose).

Investment Initiative (CCII) partnership of community-based organizations⁶⁶ aims to demonstrate how partnership between the private sector⁶⁷ and community leaders and institutions can produce a “double bottom line,” highlighting the economic and social returns in regional investment that meet the needs of public and private sector stakeholders.

The partner organizations have worked to develop an explicit set of investment criteria to ensure that low-income community residents receive concrete benefits from neighborhood developments, such as increased job opportunities, better services and mechanisms to increase resident incomes and wealth. As originally conceived, CCII-supported projects would pursue an assortment of financing sources with CCII serving as a broker and developer of funding opportunities. This initial approach has evolved into a “Family of Funds” model which aims to establish “one-stop” financing for community projects and support a “one-ask” policy for funding/financing institutions. According to the Family of Funds model, a pool of funds will be developed and coordinated, each with a distinct set of sponsors, term sheets,⁶⁸ investment managers and initial investors. These funds will each serve a different purpose, one focused on real estate, another on small business expansion, and a third on brownfields development. However, they all will be coordinated with representatives from each development interest, who will meet on a regular basis to ensure complementary and synergistic strategies and approaches. The benefit interest in the Family of Funds model enables investors to spread risk, pool investments, lower transaction costs and otherwise operate more efficiently. At present, three funds are underway with the possible addition of two additional funds.

Innovative funding mechanisms that directly address wealth accumulation among the disadvantaged are also being explored nationwide. Prevailing public policy aimed at helping the poor is designed to help them maintain a minimum level of subsistence through income transfer, but fails to take into account the concept of developing assets.⁶⁹ Individual Development Accounts (IDAs)

66. PolicyLink is currently working in partnership with the National Economic Development and Law Center and the Urban-Habitat Program. The three organizations are working as planners, developers and co-chairs of the CCII to facilitate strategic capital investments in forty-six low-income communities in the Bay area. The CCII concept emerged from the regional discussions of the Bay Area Alliance for Sustainable Development (BAASD).

67. The partner organizations are working in close collaboration with the private and public sectors through a Business Council, chaired by the Bay Area Council and a “Government Advisory Panel” led by the federal Department of Housing and Urban Development (HUD) and the California State Treasurer’s Office. This collaborative approach is driven by the belief that all three sectors—community, business and government—are necessary in planning and implementing development that achieves broadly shared economic prosperity in an environmentally sustainable way.

68. Term sheets are legally binding documents that describe the guidelines and specific criteria by which funds will be invested, including the structure of the fund, and its rate of return.

69. Assets are commonly referred to as the stock of wealth in a household while income refers

provide one example of a method to counter the current approach and aid low-income communities in building wealth. Designed to promote long-range planning, savings, and investment, IDAs are dedicated savings accounts similar in structure to Individual Retirement Accounts (IRAs). Their use is limited to the purchase of a home, payment of educational or job training expenses, or for capitalizing a small business. Participants make a monthly deposit, which is then matched using both public and private sources. Additionally, holders of these accounts receive economic literacy training to learn about credit ratings, budgeting, savings and money management.

IDAs are taking hold across the country.⁷⁰ As of August 2000, twenty-nine states have passed IDA legislation, and over 400 IDA programs are being planned or operated by local community organizations. On the national level, the Assets for Independence IDA Program was approved by Congress in 1998. The Office of Refugee Resettlement has also established an IDA program for organizations across the country assisting refugee populations. Perhaps most significantly, IDAs were included in the Personal Work and Responsibility Act of 1996, making it easier for welfare recipients to enroll in IDAs by allowing them to exclude IDAs as assets for the purpose of qualifying for benefits. Finally, at least twenty-five states have incorporated IDAs into their welfare plan.

In addition to IDAs, there is a need to explore ways for residents to have ownership interests in development of their communities. New ideas are under exploration that offer low-income residents the opportunity to build their financial assets through the revitalization of their communities. By giving residents a direct stake in the economic development of their communities, these new models assure that residents will have voice in the development process. Some of the models being explored offer opportunities for residents to leverage public and private reinvestment flows to their benefit, and become direct stakeholders in economic institutions in their communities. These emerging models also build stronger accountability mechanisms into the economic development process.

Workforce development strategies are also needed to complement wealth-building efforts. Workforce development must focus on connecting low-income people to good quality jobs. Some of the best jobs today are in the information technology industry. However, it is well-established that low-income individuals often lack the skills to qualify for these jobs. Technology must be regarded as a potential tool to level the playing field between the economically advantaged and disadvantaged as community-serving organizations amplify their efforts to reduce inequity.

While there is a growing demand for information technology workers, many of these jobs go unfilled.⁷¹ At the same time, forty percent of information

to the flow of resources in a household. See MICHAEL W. SHERRADEN, *ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY* (1991).

70. IDA information is available at <http://www.gwbweb.wustl.edu/users/csd/ida/whatareIDAs.html>.

71. See Michael A. Stoll, PolicyLink and the Bay Area Video Coalition, *Workforce*

technology jobs do not require a college degree. This pool of jobs should receive the attention and focus of workforce development programs. Traditional approaches to job training are not adequate because they either focus on basic education or are designed to move clients to jobs as quickly as possible.⁷² In both cases, clients do not receive the skills that employers need. Hence, while these approaches might realize some short-term gains, they have not proven to be successful over the long haul.

Research indicates that a growing number of information technology training programs are making a difference. For example, programs with formal placement strategies have been shown to have rates ranging from seventy to ninety-five percent.⁷³ Providing “hard” skills relevant to employer needs is key. The Bay Area Video Coalition (BAVC), for example, actively courts employers by offering to train media workers at no cost. At the same time, potential employers serve as an important source of information about industry trends. For example, when Apple Computer introduced Final Cut Pro, Apple donated the software to BAVC. Because of the donation, BAVC was able to offer training in what quickly became the industry standard.⁷⁴

Such vocational training programs also provide community groups, community colleges, and employers an opportunity to forge unique coalitions. The Seattle-King County Private Industry Council and Bellevue Community College are partners in a technology-based, worker-retraining program. The college conducts the training, while the council manages the outreach, assessment, placement and retention services. A third group, the Northwest Center for Emerging Technologies, provides expertise on curriculum development. The program staff attributes their success to the flexible and cooperative relationships among the institutions.⁷⁵

CONCLUSION

Local advocates concerned about opportunity and inclusion now have a menu of strategies at their disposal to advance the causes of social justice in deep-rooted ways. Two primary areas of focus involve reframing regional economic development to make the process more fair and inclusive to all, and connecting low-income residents to a broader range of economic opportunities through wealth building. Central to these emerging models is the role of voice. Vibrant democracies require broad civic participation. Voting is essential, but voting is just one way to ensure that residents have a voice in the major decisions that

Development Policy and the New Economy, at 3 (Oct. 2000) (unpublished manuscript) (on file with author). “[O]ver the next 12 months about 840,000 of the expected 1.6 million newly created jobs in IT will go unfilled. These numbers indicate vacancy rates for IT jobs of some 8.4 percent as compared to six percent for the general economy during economic expansions.” *Id.*

72. *See id.* at 5-7.

73. *See id.* at 7.

74. *See id.* at 12.

75. *See id.*

affect their lives. Too often, decisions that affect low-income people have been made by outsiders. It is time to recognize that the experience and wisdom of people in poor communities bear directly on policy decisions. Only by including their voices can authentic and sustainable solutions to inequity be achieved.

LAND, CULTURE, AND COMMUNITY: REFLECTIONS ON NATIVE SOVEREIGNTY AND PROPERTY IN AMERICA

REBECCA TSOSIE*

God created this Indian country and it was like He spread out a big blanket. He put the Indians on it. They were created here in this country, truly and honestly, and that was the time this river started to run. Then God created fish in this river and put deer in these mountains and made laws through which has come the increase of fish and game. Then the Creator gave us Indians life; we awakened and as soon as we saw the game and the fish we knew they were made for us . . . I was not brought from a foreign country and did not come here. I was put here by the Creator.¹

INTRODUCTION

Chief Meninock's words describe a world in which the Native people, the land and its resources interact under a Divine plan created for a particular place on earth. The people exist under the same set of laws that governs all other living things, which results in order, balance, and abundance. Contemporary American society, of course, is governed by a system of man-made laws that has created an *imbalance* of resources, whether measured in tangible ways (e.g., land) or intangible ways (e.g. equality of opportunity). This Symposium addresses that problem by evaluating the continuing inequalities in wealth and property that exist in America.

"America" symbolizes many things, among which are a geographical territory, a robust pluralism that highlights values of tolerance and respect for diversity, and a constitutional democracy that has become one of the major world powers. Each of these aspects informs the dialogue on property, wealth and inequality. But for the indigenous peoples of this land, "America" has a different meaning. Acoma poet Simon Ortiz says that, "[N]ative culture is at the heart of everything that is America."² Indigenous identity is formed by the intersection

* Lincoln Professor of Native American Law & Ethics; Executive Director, Indian Legal Program, Arizona State University College of Law. This Article is based on the remarks I made at the AALS Workshop on Property, Wealth and Inequality at the 2001 annual meeting in San Francisco, California. My thanks to Dean Stuart Deutsch for inviting my participation, and to the editorial staff of the *Indiana Law Review* for their great patience and dedication to this Symposium. The Symposium sparked an abundance of intriguing ideas, complex problems and areas for further inquiry. This Article is intended merely to highlight some of these ideas, issues and problems, as they relate to Native peoples. I leave their further exploration for another day and a more comprehensive analysis.

1. Testimony of Chief Meninock (Yakima) During a 1915 Trial for Violating a Washington State Code on Salmon Fishing, in *GREAT DOCUMENTS IN AMERICAN INDIAN HISTORY*, 297-98 (Wayne Moquin & Charles Van Doren eds., 1973).

2. Simon Ortiz, Presentation at American Indian Studies Director's Conference, Arizona

of land, culture, and community, and the way we respond to those critical elements of our existence defines the meaning of "sovereignty" and "property" for the First Nations of this land.

The discussion of "property, wealth and inequality" for Native people is one that depends upon an understanding of how Native sovereignty and land rights have been adjudicated in this country. Indian Nations within the United States exist as "nations within a nation." Native peoples' survival in America depends upon their ability to maintain their unique cultural identity as well as their separate political status. As separate cultures, Native peoples maintain distinctive world views, containing a composite of values and norms, that guide the ways in which the people relate to their ancestral lands and resources. As separate governments, they maintain a measure of autonomy over their lands and exert ownership over natural resources such as water, fish and game, timber, and minerals. However, the federal government serves as the "trustee" for reservation lands and resources. Thus, although the Native people have beneficial use of these lands and resources, the title is held in trust for them by the United States government.

As trustee, the United States has certain powers of control and disposition that have not always been used for the best interests of Indian people. That fact has been vindicated in a number of important lawsuits brought by Indian nations and tribal members to force the federal trustee to account for its mismanagement of these interests.³ The trust doctrine, which highlights the fact that Native people own a great deal of "property," though they often lack control over these resources, has been the basis of much of what has been written about property, wealth and inequality for Native people.⁴ I will not duplicate those important works but will focus on a much less obvious problem: the distinctive normative basis for the rights to land and autonomy, which are at the heart of the debate over "property, wealth and inequality" for Native people.

For the many Nations indigenous to these lands, the concepts of "wealth" and "property" that we apply to discussions of land and other natural resources, are

State University (Feb. 16, 2001) (on file with author).

3. See, e.g., *United States v. Mitchell*, 463 U.S. 206 (1983) (holding federal government liable for mismanagement of timber resources); *Seminole Nation v. United States*, 316 U.S. 286 (1942) (holding that the federal government breached its fiduciary duty to the Seminole Nation by paying treaty annuities to a tribal treasurer, who misappropriated funds, rather than to tribal members, as called for by the treaty); *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), *aff'd sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (class action suit by individual beneficiaries of Individual Indian Money Accounts for mismanagement of accounts). Through several rounds of litigation, the plaintiffs in the *Cobell* case have prevailed in the district court and in the Court of Appeals. See also Bill Miller, *Court: \$10 Bil. Owed Indians; U.S. "Has Failed Time and Again,"* ARIZ. REPUBLIC, Feb. 24, 2001, at A28.

4. See, e.g., Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Tribal Lands and Resources*, 1995 UTAH L. REV. 109.

quite distinctive. This essay is intended to highlight some of those features and to respond to the themes of this Symposium on "Property, Wealth, and Inequality," in this multicultural and pluralistic society that we call "America." Part I offers an historical overview of the relationship between property and sovereignty for Native peoples in this country. Part II describes the contemporary conflicts that Indian nations face as they exert their rights to property and sovereignty. Part III highlights the normative differences that underlie intercultural conflicts over land and autonomy, offering a conceptual framework for the debate. Part IV builds on this conceptual framework by proposing a mode of analysis for further development of this subject.

I. PROPERTY AND SOVEREIGNTY IN AMERICA: AN HISTORICAL OVERVIEW

The history of the United States is, at a very basic level, a history of conflict over two things: property and sovereignty. Nowhere is this conflict better illustrated than in the history of conflicts over land and governance between Indians and non-Indians. The federal government's policies were directed at nation-building and, hence, the acquisition of maximum amounts of territory and governmental autonomy. Unfortunately, despite the treaty paradigm, which should have brought about intercultural and bilateral negotiations of rights to sovereignty and property, Native people have been placed in the position of *reacting* to federal policy. Thus, while the federal government's purported policy was to enter into treaties with Indian nations to gain rights to land, its "real" policy was to gain the maximum amount of land for white settlers (who would "efficiently" use the land) at the least possible cost, in terms of warfare and lives.⁵

In 1783, President George Washington articulated the country's first "Indian policy":

[P]olicy and [economy] point very strongly to the expediency of being upon good terms with the Indians and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there.⁶

Of course, Washington was confident that this policy would placate the Indians and that the growing numbers of American settlers would encroach upon the diminishing numbers of Indians until they were no more. He wrote that, "the gradual extension of our Settlements will as certainly cause the Savage as the

5. See, e.g., Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000) (arguing that the laws and policies that appropriated Indian lands for non-Indian use and enjoyment were designed to promote "efficiency," i.e., the most cost-effective expropriation).

6. Letter from George Washington to James Duane (Sept. 7, 1783), in *FEDERAL INDIAN LAW* 84-85 (David H. Getches et al. eds., 4th ed. 1998).

Wolf to retire; both being beasts of prey tho' they differ in shape."⁷

In 1817, President James Monroe stated, in his first annual message to Congress, that the Indian nations should be forced to open their lands to settlement by non-Indians.⁸ "No tribe or people," he explained, "have a right to withhold from the wants of others more than is necessary for their support and comfort."⁹ This statement became the philosophical justification for the government's policy of divesting Native peoples of their lands, through treaty and outright warfare. President Grant's Indian policy reflected a tenuous balance between "war and peace."¹⁰ If Indian Nations, such as the Lakota Sioux, would "peacefully" submit to land cessions, this was the government's preference; if not, the "iron fist" of federal Indian policy—the U.S. Cavalry—stood ready. It is no accident that the administrative agency charged with "management" of Native peoples, the Bureau of Indian Affairs, began its existence in the Department of War, not the Department of Interior. President Monroe established the Office of Indian Affairs within the Department of War, in March of 1824.¹¹

Not surprisingly, with the loss of their traditional lands, Native people also lost a great deal of their autonomy. The reservation system was designed to curb Native sovereignty over the relatively large areas of their aboriginal territory, and the federal government used its land policies to fragment the political authority of Indian nations. For example, the government broke down powerful alliances of Native people, such as that among the Lakota, Dakota and Nakota peoples that comprised the Sioux Nation, by separating them onto small and dispersed reservations. In other cases, the federal government removed "hostile" factions of Indian tribes to geographically distinct locations, where their ability to mobilize the tribe against the federal government would be minimized. This is what happened, for example, to the Chiricahua Apache resisters, who fought the United States, under the leadership of Geronimo, and were subsequently shipped from their ancestral lands in the Southwest to Florida and then to Oklahoma.¹²

The Reservation and Removal policies eroded the treaty-based paradigm of

7. *Id.*

8. See Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1m 1 n.3 (1991) (citing 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 149 (1984)).

9. *Id.* at 1 (quoting PRUCHA, *supra* note 8, at 149).

10. See ROBERT M. UTLEY, *THE INDIAN FRONTIER OF THE AMERICAN WEST: 1846-1890* 132 (1984) (discussing President Grant's "Peace Policy" toward American Indians, as well as his alternative plan: "Those [Indians] who do not accept this policy will find the new administration ready for a sharp and severe war policy").

11. Kevin Gover, Assistant Secretary, Indian Affairs, Dep't of the Interior, Remarks at the Hall of Tribal Nations ceremony (Sept. 8, 2000) (on file with author); see also BUREAU OF INDIAN AFFAIRS, *SHORT HISTORY OF THE BIA*, available at <http://www.doi.gov/bia/shorthist.html> (last visited June 1, 2001).

12. See H. HENRIETTA STOCKEL, *WOMEN OF THE APACHE NATION* 7 (1991).

tribal sovereignty, but the Dawes Allotment Act was even more devastating.¹³ The Dawes Act of 1887, which broke up collective tribal landholdings on many reservations in order to grant individual land allotments to tribal members, was passed absent any consultation with the Indian Nations. The Dawes Act followed an 1871 rider to a Congressional appropriations bill, which “officially” ended treaty-making with Indian Nations. However, it did not explicitly extinguish existing Indian treaty rights; nor did it contain explicit limitations on tribal sovereignty. Rather, it suggested that the purpose of allotment was quite benevolent: to grant individual Indians property rights comparable to those of “civilized” people and, therefore, facilitate their integration into American society. Of course, the Dawes Act was also responsible for the loss of nearly 100 million acres of tribal treaty lands, which were designated as “surplus lands” and opened for settlement by non-Indians.¹⁴

The Dawes Act was later interpreted, by the United States Supreme Court, to allow the allotment of Indian lands and sale of surplus lands, in violation of treaty provisions forbidding the acquisition of Indian lands without tribal political consent.¹⁵ In fact, the only qualification was that the Indian tribe, as ward, had to be given equivalent compensation for the land taken by its federal “trustee.”¹⁶ Although the Indian Reorganization Act of 1934¹⁷ officially ended the allotment policy, the Dawes Act left a severe and traumatic legacy for Indian nations. Many Indian people lost their allotments after they were released from trust status through tax foreclosures and sales under economic duress. Reservation communities continue to suffer jurisdictional problems administering “checkerboard lands,” which are areas on the reservation where tribal trust allotments are interspersed with parcels owned in fee by non-Indians. Additionally, in some cases, this pattern of ownership has inspired the federal courts to find that the external boundaries of the reservation have been “diminished” or even that the reservation has been “disestablished.”¹⁸ In such cases, the Indian nation can only exercise jurisdiction over those parcels still held by the tribe or its members, and the state regulates the balance of the land.

Most significantly, however, several modern opinions of the United States Supreme Court have created a doctrine giving preference to the rights of non-Indian property owners on the reservation over the rights of tribal governments

13. Dawes Allotment Act, 25 U.S.C. §§ 331-334 (1994).

14. Under the Allotment Policy, Indian landholdings were reduced from 138 million acres in 1887 to 48 million acres in 1934. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 10 (1983). For general background on the Allotment Policy, see *id.* at 8-12.

15. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

16. See *id.* at 566-68.

17. 25 U.S.C. §§ 461-479 (1994).

18. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789 (1998) (finding that Yankton Sioux Tribe’s Reservation was diminished by allotment act); *Hagen v. Utah*, 510 U.S. 399 (1994) (finding that Uintah Indian Reservation was diminished by congressional act opening reservation to non-Indian settlement).

to effectively regulate reservation lands.¹⁹ Professor Singer has described this doctrine as one whereby the Court abdicates its responsibility to protect tribal property rights by treating tribal property and restricted trust allotments owned by tribal members as a "commons available for non-Indian purposes when needed by non-Indians."²⁰

II. CONTEMPORARY CONFLICTS OVER PROPERTY AND NATIVE SOVEREIGNTY

The meaning of tribal sovereignty, as it relates to property rights, is particularly compelling in a public policy era focused on protecting the vested property rights of American citizens. The debate over water rights in the many on-going Western stream adjudications, which involve the application of the prior appropriation doctrine, provides a good example of this. In the arid climates of the West, a landowner's "wealth" is often best measured by the water rights that support his or her use of the land resource. Although the priority dates of the Indian tribes are generally the earliest in time, often their rights have not been recognized with respect to water projects. In the minds of most non-Indians, the rights of Indians to available water are secondary to those of private citizens, whose property rights are "perfected" and have become "vested." The idea, that tribal interests in water should not be recognized in the face of the vested property interests of individual citizens, became one of the policy underpinnings for Chief Justice Rehnquist's opinion in *Nevada v. United States*.²¹ In *Nevada*, the Court applied *res judicata* to bar the Pyramid Lake Paiute Tribe's challenge to a 1944 adjudication of their water rights, which failed to provide water for fisheries, though the fisheries were critical to the tribe, and despite the fact that the tribe had not been effectively represented in the proceeding because of the federal government's conflicting duty to the non-Indian beneficiaries of the reclamation project.²²

Another dominant theme in the Supreme Court's current jurisprudence is the idea that tribal interests in uniform regulation of land, within the exterior boundaries of the reservation, should be subordinated to the interests of non-Indian owners of "fee land" within the reservation. Rather than trying to facilitate the efficient administration of reservation lands by Indian tribes, the Court's opinions have increasingly determined that Indian nations retain very limited jurisdictional authority over non-Indians on fee lands.²³ These opinions

19. See, e.g., *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408 (1989) (holding that Yakima Nation did not have jurisdiction to regulate land use on non-Indian fee land within the "open" area of the reservation); *Montana v. United States*, 450 U.S. 544 (1981) (holding that Crow Tribe did not have the jurisdiction to regulate hunting and fishing by non-members on fee land within the reservation).

20. Singer, *supra* note 8, at 3.

21. 463 U.S. 110 (1983).

22. See *id.* at 145.

23. See, e.g., *Atkinson Trading Co., Inc. v. Shirley*, 121 S. Ct. 1223 (2001) (holding that Navajo Nation did not have jurisdiction to impose a hotel occupancy tax upon nonmembers on non-

are supported by the Court's belief that the "diminished sovereignty" of Indian tribes over their reservation impairs their ability to regulate non-Indians.²⁴ So, to the extent that the tribe has lost its treaty "right to exclude" non-Indians from the reservation (through the federal government's allotment of the reservation and sale of land to non-Indians), it has also lost its right to regulate. If the Tribe seeks to regulate non-Indian property owners, under its inherent sovereignty, the Court finds that the "dependent" status of the Indian tribes conflicts with their ability to limit the vested property interests of non-Indian landowners.²⁵

In *Montana*, for example, the Court held that Indian tribes had been implicitly divested of their inherent sovereign authority to regulate non-Indian hunting and fishing on non-Indian fee lands within the reservation.²⁶ The Court reasoned that the "exercise of tribal power beyond what is necessary to protect tribal self-government or control internal relations is inconsistent with the dependent status of the Indian tribes and so cannot survive without express congressional delegation."²⁷ In *Brendale*, the plurality opinion of the Court decreed that the tribe had been divested of zoning authority over non-member fee land in the "open" area of the reservation, although the tribe retained such authority over fee land held in the "closed" area of the reservation (an area of the reservation where there was a minimal amount of fee land and which was closed to nonmembers who were not residents and where the tribe held cultural activities).²⁸ Despite the fact that "checkerboard" zoning jurisdiction, like "checkerboard" wildlife management, is inherently unworkable, the Court opted to protect the liberty interests of the non-Indian landowners over the tribe's interests in effective governmental regulation. The subtext of these cases emerges in Justice Stevens' separate opinion in *Brendale*, which expresses his belief that Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community and that nonmembers have no opportunity to participate in tribal government.²⁹

Cases like *Montana* and *Brendale* demonstrate the Court's current belief that tribal jurisdiction over non-Indian property owners on the reservation has been severely curtailed. Most recently, the Court's opinion in *Strate* further narrows the two exceptions set forth in *Montana*, which supported the inherent right of tribes to regulate non-Indian activities which have a direct effect on important tribal interests or where the non-Indian party is in a consensual relationship with the tribe or its members.³⁰ Not surprisingly, the boundaries of tribal

Indian fee land within the reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), *Montana v. United States*, 450 U.S. 544 (1981).

24. See *Montana*, 450 U.S. at 565.

25. See *id.* at 563-64.

26. See *id.*

27. *Id.* at 564.

28. See *Brendale*, 492 U.S. at 422-32, 443-44, 456-59.

29. See *id.* at 434-36 (Steven, J., concurring).

30. See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that a tort action against non-

jurisdictional authority are currently under further attack in the federal courts.³¹

The Supreme Court's recent jurisprudence jeopardizes remaining tribal rights to land and political autonomy. While the Court seems satisfied that Indian nations possess sovereignty over their trust lands and tribal members, it has severely limited the ability of tribal governments to protect their lands and resources through effective, uniform regulation. By granting priority to the interests of non-Indian landowners, the Court disregards the responsibility to protect the tribes' interests. As Professor Singer's comprehensive article on this problem notes, these cases "teach us a great deal about both the social meaning of property rights and about the just and unjust exercise of governmental power."³²

Indeed, Professor Singer highlights several features of recent jurisprudence, that stand in direct contravention of "some of the most cherished truisms about the meaning of private property in America."³³ First, these cases show that the Court's protection of property interests is not uniform. The Court gives stringent protection to non-Indian owners of fee land on the reservation, while it treats the group rights of Indian nations to their trust lands as a social anachronism of "communal property," that can be made secondary to non-Indian interests. Interestingly enough, when the debate is between Indian and non-Indian property interests, the Court lumps individual Indian allottees along with the tribe, without much thought as to why individual property rights should be treated differently depending upon whether the holders are Indian or non-Indian.³⁴ However, when the debate over property rights is between an individual Indian allottee and his or her Nation, the Court tends to side with the individual property owner.³⁵

Second, the Court assumes that non-Indian property owners on the

Indians, with respect to an accident occurring on a public highway that ran through an Indian reservation, could not be brought in a tribal court because the action failed to qualify under the *Montana* exceptions).

31. Earlier this Term, the Supreme Court heard arguments in *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 1999), *cert. granted*, 121 S. Ct. 296 (2000). The Court is reviewing the Ninth Circuit's opinion upholding the jurisdiction of the Fallon Paiute-Shoshone Tribal Court over a claim by a tribal member against state law enforcement officers for alleged tortious conduct and civil rights violations arising on a trust allotment owned by the member within the reservation. Another case to monitor is *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000), *reh'g en banc granted*, 240 F.3d 1215 (9th Cir. 2001), in which the Ninth Circuit held that the Hoopa Valley Tribe does not have authority to regulate timber harvest on non-Indian owned fee land within the reservation located within a "buffer zone" designated by the tribe as necessary for preservation of a protected cultural site.

32. Singer, *supra* note 8, at 3.

33. *Id.*

34. *See id.* at 3-4.

35. *See, e.g., Hodel v. Irving*, 481 U.S. 704 (1987) (holding unconstitutional a provision of the Indian Land Consolidation Act which permitted forfeiture to the tribe of minute fractionated heirship interests in allotted parcels belonging to tribal members when the decedent failed to specify an alternative disposition by will).

reservation have the right to be free from political control by Indian nations.³⁶ According to Justice Stevens' separate opinion in *Brendale*, it would not be fair to subject such property owners to the control of a tribal government which does not allow non-Indian participation. On the other hand, the Court has little difficulty in finding that Indian nations are subject to the political sovereignty of non-Indians.³⁷ As Singer notes, this disparate treatment of both property and political rights is not the result of neutral rules being applied unfairly; it is the result of "formally unequal rules."³⁸ Singer asserts that this implies an uncomfortable truth: "both property rights and political power in the United States are associated with a system of racial caste."³⁹

Although some may find Singer's comment a bit polemical, it finds a great deal of support in the history of treaty relations in the United States for two distinctive groups: American Indian Nations and Mexican-Americans. Despite a very different historical context, the contemporary claims of Mexican-Americans to justice, under the Treaty of Guadalupe Hidalgo, are analogous to American Indian treaty claims because they are group-based and emphasize both the cultural rights of Mexican people within the dominant society and the need for the United States to admit its history of injustice, which has caused their dispossession from their lands.⁴⁰ Mexican-Americans view the Treaty as imposing a moral obligation upon the United States to respect the property rights and human rights that were guaranteed to the Mexican nationals who were incorporated into the United States.⁴¹ The courts, however, have largely disregarded this perspective, viewing the Treaty as an agreement between sovereigns, unsuitable for analysis in a domestic dispute between U.S. citizens and their government.⁴²

The Court's interpretation of Indian treaties is often inconsistent. Sometimes the Court has interpreted the treaties as agreements between sovereign powers, which guaranteed the Indian nations their continued right to govern their lands and resources.⁴³ In other cases, the Court has used a much more restrictive reading of treaties, finding that they, in fact, *created* tribal rights to their resources,⁴⁴ and that those rights can be unilaterally abrogated by the action of

36. See Singer, *supra* note 8, at 4-5.

37. See *id.*

38. *Id.* at 5.

39. *Id.*

40. See Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1635 (2000).

41. See *id.*

42. See *id.* at 1631-32 (discussing *Botiller v. Dominguez*, 130 U.S. 238 (1889), which upheld an interpretation of a statute that resulted in the dispossession of many Mexicans from their treaty-guaranteed land rights).

43. See, e.g., *United States v. Winans*, 198 U.S. 371, 381 (1905) (upholding the Tribe's off-reservation fishing rights on the basis that "the treaty was not a grant of rights to the Indians, but a grant of rights *from* them—a reservation of those not granted").

44. See, e.g., *Montana v. United States*, 450 U.S. 544, 559 (1981) (noting that, if the Crow

the federal government, as a "superior" sovereign exerting authority over the "dependent" Indian tribes.⁴⁵ Not surprisingly, the Court's restrictive reading of Indian treaties is generally applied to protect and enhance *non-Indian* property interests.⁴⁶

This discussion highlights the need to identify the conceptual basis for the conflict between land and autonomy that informs the debate over "property, wealth, and inequality."

III. THE CONCEPTUAL BASIS FOR THE CONFLICT OVER LAND AND AUTONOMY

Where do Native peoples fit within the debate over "property, wealth, and inequality"? In order to formulate a response to this key question, we must first have a working definition of property, wealth, and inequality. But even at this most fundamental level, the conceptual disjunction between Native and non-Native cultures is apparent. Most importantly, do Native and non-Native people even share a common understanding of "property"? Even if we all agree to a standard definition of "property" as the rights, powers, and interests that individuals and groups have with respect to a variety of resources (e.g., water, fish, plants, cultural objects), there remains a fundamental problem with our understanding of how those rights, powers and interests come into being. Professor Laura Underkuffler-Freund offers an important insight into the problem, when she writes:

Property rights are, by nature, social rights; they embody how we, as a society, have chosen to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others. Try as we might to separate this right from choice, conflict, and vexing social questions, it cannot be done.⁴⁷

Property, then, depends upon the *relationships* among people in a society. This appears to make sense for individuals, who collectively comprise a unitary society. The debates among those individuals may rationally relate to other social ideals, such as equal access, distributive justice, and fairness in the

Tribe's 1868 Treaty with the United States "created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians").

45. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding that the United States could unilaterally abrogate a treaty provision, when "in the interest of the country and the Indians themselves").

46. In *Montana*, the Court's interpretation supported the private property rights of non-Indian landowners on the reservation; in *Lone Wolf*, the Court's interpretation supported the forcible allotment of the Treaty reservation of the Apache, Comanche, and Kiowa Nations, and the subsequent sale of a large portion of those lands to non-Indian settlers.

47. Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1046 (1996) (footnote omitted).

adjudication of their respective rights to land and other resources.⁴⁸ However, this understanding is problematic when dealing with the rights of distinctive *peoples*, who preexisted the formation of the society and who were involuntarily annexed (as sovereign groups) into that society through acts of colonialism. The question of intercultural justice is at the heart of this relationship and the way we conceptualize the institution of property can continue to strip Native peoples of their lands and autonomy.

Moreover, our normative foundation of property involves the values that we attach to the idea of "ownership." Joseph Singer commented that "[o]wnership entails not only the granting of rights but also the adoption of obligations."⁴⁹ As a society, we grant rights to protect individuals' interests in liberty, autonomy, and self-determination. As a society, we must agree on the obligations that such ownership entails, such as the obligation to refrain from harming one's neighbor, which is at the heart of the ancient maxim "sic utere." In some cases, such obligations are reciprocal. For example, as zoning law illustrates, it may only be through agreeing to have one's rights *limited* that one's ultimate enjoyment of property rights is guaranteed.

Again, however, this entire structure depends upon some uniform notion of the values inherent in the institution of property. It is entirely possible, for example, that the questions of justice that inform the relationship among individual property owners in a society are quite different from those implicit in relationships among separate sovereign governments and the Nation that involuntarily incorporated them. To simplify a very complex point, if property law as an institution is to be just in its application to Native peoples, it must at least attempt to respect their unique claims to land and resources. The existing framework, unfortunately, does not.

As the discussion in Part II demonstrates, the courts have largely upheld Indian Nations' use and enjoyment of *tribal trust lands* within the reservation. Thus, tribes can use those lands for economic development, including gaming facilities, timber harvesting and mining, so long as they do not offend any contrary provisions of federal law. As noted, however, their efforts to maximize the value of these lands, through effective regulation, have often been frustrated by the Court's determination to protect non-Indian owners of fee land on the reservation.⁵⁰ These frustrations are compounded by the history of devastating loss and displacement which has resulted in reservation trust lands comprising only a small portion of Indian Nation's aboriginal homelands. Moreover, many tribes were removed from their aboriginal territory altogether and settled in distant locations.⁵¹

Despite the fact that some Tribes have received monetary compensation for

48. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

49. JOSEPH WILSON SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 17 (2000).

50. See *supra* notes 18, 26 and accompanying text.

51. For example, many of the Southeastern tribes, such as the Cherokee, Choctaw and Chickasaw were relocated to the Oklahoma Indian Territory.

the forcible dispossession of their lands,⁵² they continue to suffer in ways not amenable to financial redress. To illustrate this problem, I will discuss several cases that highlight the *value* of land to Native people, reflecting a different view about property as "wealth," and explain how that value is adjudicated within modern conflicts over the appropriate use of "public lands."

A. *Land as Sacred Geography*

There is a dynamic and on-going relationship between Native peoples and the land. Although this relationship is often misunderstood by non-Indians and depicted as "nature worship" or something similar, the land carries a critical significance to indigenous peoples. Professor Frank Pommersheim described the significance, writing: "Beyond its obvious historical provision of subsistence, it is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape."⁵³ For most Native peoples, land is constitutive of cultural identity.⁵⁴ Many Indian nations identify their origin as a people with a particular geographic site, often a mountain, river or valley, which represents an integral part of the tribe's religion and cultural world view.⁵⁵ This is the case for the Lakota, who believe that they emerged from caves within the Black Hills, which they call "Wamaka Og'naka Icante"—the "heart of everything that is."⁵⁶

Land is also a way to identify the cultural universe of a particular tribe.⁵⁷ For example, the Navajo Nation identifies four sacred mountains which mark the boundaries of their universe. This understanding requires the people to undertake many ceremonial obligations and also orients the people in understanding how to meet their responsibilities to each other and to the land. Many tribes share the belief that the people must look after the land. However, such relationships are also seen as reciprocal. So, for example, the Western Apache say: "The land makes people live right. The land looks after us. The land looks after the people."⁵⁸ Among the Western Apache, place names are used very specifically to tell stories about events that took place at these sites. These

52. The Indian Claims Commission Act, ch. 959, § 1, 60 Stat. 1049 (repealed 1978), for example, provided statutory claims for compensation of grievances relating to land rights, including involuntary extinguishment of aboriginal title. Many tribes have prevailed in such claims but are typically awarded only monetary compensation. In other cases, tribes have successfully sued state governments, who acted without federal authority (in violation of the Nonintercourse Acts) to appropriate tribal lands.

53. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).

54. See Tsosie, *supra* note 40, at 1640-41.

55. See *id.*

56. William Greider, *The Heart of Everything That Is*, ROLLING STONE, May 7, 1987, at 37, 62.

57. See Tsosie, *supra* note 40, at 1640.

58. KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE 38 (1996).

stories provide a code of appropriate moral behavior to guide the people. Thus, the place name evokes not only a picture of the place but a story to “make you live right.”⁵⁹

In fact, the meaning, origin, and significance of the land resides in the stories, songs, and prayers of the Native peoples and communities that belong to these lands. The land is a source of sustenance and abundance, but the cultural knowledge that comes from the land is also a form of “wealth” for Native peoples. As Joy Harjo, a Creek poet, says: “Stories are our wealth.”⁶⁰ Leslie Silko, Laguna novelist, agrees, noting that through those stories, Pueblo culture is transmitted across generations, inclusive of the strategies, beliefs, norms, and values necessary to ensure cultural and physical survival within a specific geographic location.⁶¹ Thus, the value of these resources to Native people is measured in both tangible and intangible ways.

The land that we now call “America” in fact represents a “sacred geography” of mountains, forests, rivers, canyons, and deserts. Deward Walker identifies many sacred sites that are actively used by Native religious practitioners and discusses several “functions of sacred geography” for Native peoples, including the fact that they identify fundamental cultural symbols and patterns, provide an image of social order, and, perhaps most importantly, are a tangible link between the world of human beings and the sacred, “where spiritual power” can be accessed.⁶² Thus, “[u]nless rituals are performed at the proper locations, they have little or no efficacy.”⁶³ Notably, many of these sites are located on what are now considered to be “public lands”: National Parks, National Monuments, and land owned by the federal government and managed by agencies such as the Bureau of Land Management.

B. Public Lands: The Property of “Americans”

Normally, Americans are quite protective of their attachment to private property rights. Private property rights are exalted under American jurisprudence for serving the values of efficiency and productivity and because they enhance an individual’s basic rights, including liberty and autonomy. A strange counter-example exists, however, in the concept of “public lands” which are perceived to belong to *all* Americans collectively and which are managed for the “greater public good” by the national government. Multiple use policies governing public lands emphasize the necessity to use the lands efficiently, for commercial and economic benefit as well as recreational use.⁶⁴ Federal public land policy has

59. *See id.*

60. JOY HARJO, SECRETS FROM THE CENTER OF THE WORLD 24 (1989).

61. *See* Leslie Marmon Silko, *The Indian with a Camera, Foreword to A CIRCLE OF NATIONS: VOICES AND VISIONS OF AMERICAN INDIANS* 7 (John Gattuso ed., 1993).

62. Deward E. Walker, Jr., *Protection of American Indian Sacred Geography*, in *HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM* 110, 110-11 (Christopher Vecsey ed., 1991).

63. *Id.* at 110.

64. *See, e.g.,* The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702(c),

often vacillated between ideals of preservation, conservation, and sustainable use. The operative principle in most cases appears to be the need to balance development interests (inclusive of economic values) with preservation interests (inclusive of aesthetic values). Regardless of this debate, however, most Americans value their collective interest in public lands and routinely resist attempts, for example, to privatize the National Parks, although they perceive the value of certain private property interests (e.g. leaseholds) in public lands.

Where did these public lands come from? Our contemporary National parks and National monuments are the same lands that were appropriated from Native people by military force during the "Indian Wars" of the 19th Century. The public land laws of the late 19th and early 20th centuries, whether geared toward development, conservation, or preservation, served the interests of American citizens and not Native peoples. Native lands were appropriated for homesteading, grazing, mining, railroads, National Parks, and military installations. These lands are no longer "Indian Country" although the tribes retain important connections to these ancestral lands within their own traditions.

How does the controversy over the appropriate use of public lands affect Indian Nations? As several cases illustrate, the rights of Indian Nations to these public lands are generally considered indistinguishable from the rights of other "Americans." Indian Nations are not landowners with respect to these lands that generations of their people were born to: rather, they are considered merely "stakeholders" with a host of unique and sometimes incomprehensible (to the federal land manager) interests that they seek to assert.⁶⁵ In some cases, this disconnect in values results in the subordination of Native peoples' interests to the greater public good.⁶⁶ For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,⁶⁷ the Supreme Court failed to enjoin the government's construction of a road through a sacred site located on U.S. Forest Service land which was vital to the spiritual practice of several tribes of Indians in the Pacific Northwest. Justice O'Connor, writing for the Court, acknowledged the possibility that the road would "virtually destroy" the Native peoples' ability to practice their religion; however, she refused to apply the balancing test necessary to assess whether there had been a constitutional violation of the Indian tribes' free exercise rights, asserting that, "[w]hatever rights the Indians may have to use of the area . . . those rights do not divest the Government of its right to use what

which defines "multiple use" as the "management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people."

65. See generally Lloyd Burton & David Ruppert, *Bear's Lodge or Devil's Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J.L. & PUB. POL'Y 201 (1999).

66. This is quite problematic due to the Federal government's trust responsibility to Indian Nations, which sets up a competing obligation in the federal land manager. That issue, however is beyond the scope of this Article.

67. 485 U.S. 439, 453 (1988).

is, after all, *its* land.”⁶⁸ In other cases, such as one involving the National Park Service’s management plan for the Devil’s Tower National Monument, Native peoples’ religious interests are accommodated as a “cultural use” of the lands and qualified by the rights of other parties, such as recreational rock climbers, to enjoy the resource.⁶⁹

In recognition that their interests will never be adequately protected so long as these sacred lands are the “property of all Americans,” several Native peoples have sought to repatriate these lands to tribal ownership. Most of these efforts have been unsuccessful. So, for example, the Lakota Sioux still fight to repatriate the Black Hills, and they have refused to accept the court’s award of monetary compensation for the illegal appropriation of these treaty-guaranteed lands.⁷⁰ The Lakota are convinced that if they accept monetary damages for their claim to these sacred lands, they will forfeit their identity as Lakota people.⁷¹

One of the few success stories is the Taos Pueblo’s repatriation of Blue Lake, taken from the Pueblo in 1906 when President Theodore Roosevelt established the Taos Forest Reserve that ultimately became the Carson National Forest.⁷² Blue Lake, regularly the site for religious pilgrimage, is an extremely sacred site to the Taos Pueblo and occupies a central place in their cosmology. For years after Blue Lake was appropriated from the Taos Pueblo, tribal elders traveled to Washington, D.C. to testify before Congress and ask for the return of these sacred lands. The Taos elders testified to the obstacles they had faced in their religious and cultural practices due to restrictive federal land management policies. Finally, in 1970, President Nixon signed House Resolution 471, which restored 48,000 acres of land, including Blue Lake, to the Taos Pueblo.⁷³ As Simon Ortiz comments, the determination of the Pueblo people was “truly epic, and their resource was the oral tradition and its mythic power to confirm

68. *Id.* at 451, 453 (emphasis in original).

69. *See* Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448, 1454 (D. Wyo. 1998), *aff’d*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000). The district court found that the NPS’s voluntary closure policy, which sought to curtail commercial use of the monument during the month of June to protect important Native spiritual practices, was a permissible accommodation of religious worship because the purposes behind the policy “remove barriers to religious worship occasioned by public ownership of the Tower. This is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose.” *Id.* at 1455. On appeal, the Tenth Circuit held that the climbers lacked standing to make the Establishment Clause argument, and thus the court did not reach the merits of the case. *See Bear Lodge Multiple Use Ass’n*, 175 F.3d at 814.

70. *See* Greider, *supra* note 56, at 38; Tsosie, *supra* note 40, at 1644; *see also* United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980) (upholding judgment in favor of Sioux Nation for taking without just compensation under Fifth Amendment).

71. *See* Tsosie, *supra* note 40, at 1645.

72. *See* R.C. GORDON MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE 12 (1995).

73. Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (1970).

existence and continuance."⁷⁴

Thus, in concluding this discussion about the conceptual basis for the conflict between ideals of property and autonomy for Native and non-Native peoples, it is important to note that both groups share a commitment to ideals of property and ideals of autonomy. They differ, however, in their interpretation of what these ideals mean. To Indian Nations, autonomy means the right to self-determination as separate peoples. They also know that their sovereignty depends upon a corollary notion of property. To the extent that property represents a system of rights, duties, interests, and obligations among people with respect to resources, both groups share a belief in the existence of such a system. Where they depart, however, is on the value structure that underlies this system. Although Native peoples, like all people, share the need to use the land for their physical sustenance, they hold different notions about the appropriate relationship and obligations people hold with respect to the land. The mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor, as the Taos Pueblo case demonstrates, that they no longer maintain the rights to these lands. To Native people, land is vital to political identity (the idea of sovereignty implies the notion of a territory), to economic self-sufficiency, and also to cultural identity. If intercultural justice is to be achieved, the norms and values of the American property system must respond to these unique features of Native peoples' existence within the territorial boundaries of the United States.

IV. PERSPECTIVES ON PROPERTY, WEALTH, AND INEQUALITY: A FRAMEWORK FOR FUTURE INQUIRY

To conclude this essay, I would like to propose a framework of analysis for further thinking on how we could reach a notion of intercultural justice that would take into account Native people's unique interests in property and autonomy.⁷⁵ The connection between property and sovereignty is vital in constructing a theoretical framework for intercultural justice. In constructing this account of justice, Indian and Euro-American people must acknowledge their connections to the events that took place on the lands that were appropriated from Native people and lands that were retained by Native people as reservations.⁷⁶ In some cases, as the jurisdictional dispute over fee land demonstrates, these are the same lands. On the one hand, the reservation is integral to tribal existence: "The Reservation is home. It is a place where the land lives and stalks people; a place where the land looks after people and makes

74. Simon Ortiz, *Speaking for Courage*, in CIRCLE OF NATIONS *supra* note 61, at 28.

75. I am drawing on some preliminary ideas on intercultural justice that I expressed in my article *Sacred Obligations*. See Tsosie, *supra* note 40, at 1658-69. I was inspired in this analysis by Eric Yamamoto's important work on interracial justice. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

76. See Tsosie, *supra* note 40, at 1661.

them live right; a place where the earth provides solace and nurture.”⁷⁷ However, “paradoxically, it is also a place where the land has been wounded; a place where the sacred hoop has been broken; a place stained with violence and suffering. And this painful truth also stalks the people.”⁷⁸

The framework that I propose has three parts: first, the need to work toward an intercultural or pluralist understanding of property; second, the need to develop a relationship between law and justice that benefits Native people in the assertion of their unique rights; and finally, the need to modify accounts of distributive justice to take into account the unique historical and political status of Native peoples.

A. Developing an Intercultural Understanding of Property

A key question is whether we should continue to analyze these questions within the Anglo-American framework of property or whether we should broaden that model to include intercultural notions of property. Each Indian Nation has its own philosophical structure that defines the meaning of concepts such as sovereignty, property, and justice. In many cases, without a working knowledge of Native language, it can be very difficult to even conduct an intercultural analysis of the dual frameworks, and this difficulty poses a key preliminary challenge. Moreover, since each Indian Nation is distinctive, it is unclear whether we could abstract any general or uniform concepts. Nonetheless, on the theory that some sort of intercultural dialogue about sovereignty and property is embedded in the treaties, I would argue that we ought to at least make an attempt to start a dialogue about intercultural notions of property.

Tribal concepts of property law are often quite different from Anglo-American law, and thus, may lead to a different outcome when defining land use rights, probate distribution, and distribution of marital property. For example, Navajo law uses the idea of the “customary trust” to decide who is eligible for agricultural permits and land use assignments. Traditional Navajo land tenure dictated that land occupancy be held by family groups. Thus, the family holds land in a form of communal ownership, but certain family members may have specific rights to specific areas, such as the right to graze cattle or sheep or the right to grow crops.⁷⁹

Navajo custom dictates that agricultural land should not be subjected to numerous fragmented interests. Thus, in a probate case where the decedent had several children, the customary usage interest was awarded to the heir in “the best position to make proper and beneficial use of the land.” Another value of Navajo customary law, however, is the value of “equal treatment” for children. So, in this case, each of the other children received property from the estate to “equalize” their shares and prevent acrimony. These cases illustrate cultural constructs about fairness and equality which become important in an intercultural

77. FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 15 (1995).

78. *Id.*

79. *See Begay v. Keedah*, 19 Indian L. Rep. 6021, 6022 (Navajo 1991).

dialogue about property rights.⁸⁰

Indeed, these concepts have analogues in other tribes. For tribes along the Northwest Coast, such as the Yurok, customary laws describe the areas where families can conduct their hunting, fishing, and gathering. These use rights are passed down from generation to generation. If an outsider fishes in a customary area belonging to the family, the wronged family may demand compensation. Also, among the Northwest Coast tribes, as well as other tribes, there is a concept of "clan trust property," which includes cultural artifacts of historical and spiritual significance to the entire clan. Such artifacts are often sought after by non-Indian art collectors, but it is important to realize that individual members of the clan do not have the right to alienate these artifacts from the clan.⁸¹ Again, the sense that there are group rights to the property prohibits alienation from the group. Although certain members may be designated as caretakers of the property, they do not have the right to sell the artifacts to others. Many contemporary tribes have adopted laws governing cultural property in order to protect the interests of specific clan and kinship units within the tribe.

Finally, it is apparent that many tribes employed mechanisms to ensure the equal distribution of property throughout the tribe. For example, the Tlingit, Kwakiutl and Haida Indians of Alaska maintained an elaborate Potlatch ceremonial tradition through which wealthy and influential families would redistribute their wealth among the less fortunate members of the tribe. Although they may have lost portions of material wealth through this process, these individuals and families gained social status and prestige through their acts of generosity. Amazingly enough, the Potlatch ceremony was one of the customs that the Europeans sought to eradicate, perceiving it to be heathen and wasteful. Thus, Native traditions contain a rich source of norms governing property and might well provide the foundation for an intercultural notion of property that is flexible and can address the claims of Native people in American society.⁸²

B. Articulating a New Relationship Between Law and Justice

To the extent that courts continue to adjudicate intercultural claims within the Anglo-American property structure, it becomes important to ensure that this structure is not being used to unfairly suppress and disregard Native peoples' interests. The legal system makes constant choices about which interests to define as property and also determines how to allocate power between competing claimants when interests conflict. A premier example of those conflicting interests is the debate over the appropriate use of public lands.⁸³

Professor Singer elaborates this important point in one of his articles.⁸⁴

80. See *In re Estate of Benally*, 5 Nav. R. 174, 179-80 (1987).

81. See *Chilkat Indian Village, IRA v. Johnson*, 20 Indian L. Rep. 6127, 6131 (Chilkat Tr. Ct. 1993).

82. See COLIN F. TAYLOR & WILLIAM STURTEVANT, *THE NATIVE AMERICANS* 156-57 (1991).

83. See discussion in Part III, *infra*.

84. Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict*

Professor Singer observes that property rights are not self-defining.⁸⁵ According to Singer, pragmatists counsel attention to the actual workings of the law in particular settings in social life, exploring the historical and social context in which the law operates, instead of focusing on formal systems and conceptual neatness.⁸⁶ Thus, pragmatism is designed to focus on the human dimension of the law and promote social practices that promote human flourishing, rather than accepting social practices that create unnecessary human misery. Singer outlines the danger of “complacent pragmatism,” the tendency to rely on “common sense” to assess the consequences of certain conduct and uncritically accept the idea that we are all in agreement about the ultimate goals of society.⁸⁷ In particular, complacent pragmatism fails to give an adequate account of the problem of power. As Professors Minow and Spelman point out, it is necessary to look not only at the particularities of certain situations, but at the systematic power relationships in society that act as impediments to social change.⁸⁸

In his article, Singer examines the *Lyng* case and argues for a “revitalized critical form of pragmatism” that examines the law’s impact on the interests of oppressed Native peoples.⁸⁹ In *Lyng*, the Court maintained that even if the construction of the road would virtually destroy the Indians’ ability to practice their religion, the Constitution simply did not protect those claims because this was not the type of injury to religion that the Constitution guards against.⁹⁰ Specifically, the Court refused to find any evidence that the government “coerced” the Indian Nations into giving up their beliefs or prohibited the Indians from practicing their religions. In the Court’s analysis, the Indians’ religious practice could not foreclose the government from managing its lands and thereby confer upon the Indians “de facto” ownership of “public lands.”⁹¹

According to Singer, the *Lyng* case is representative of “complacent pragmatism.”⁹² Justice O’Connor’s opinion is pragmatic because it focuses on the consequences of recognizing an injury; it is complacent because she relies on her own “common sense” to judge the consequences. Within O’Connor’s frame of reference, it seems quite unlikely that the Indians need *all* of this land to practice their religion.

As Singer notes, the common law of property is not neutral with respect to

between Critical and Complacent Pragmatism, 63 S. CAL. L. REV. 1821 (1990).

85. *See id.*

86. *See id.*

87. *See id.* at 1824 (citing Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990)).

88. *See id.* at 1823 (citing Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1605 (1990)).

89. *Id.* at 1826; *see also* *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

90. *See Lyng*, 485 U.S. at 453.

91. Singer, *supra* note 83, at 1832, 1835 (citing *Lyng*, 485 U.S. at 450).

92. *See id.* at 1827-28.

religion.⁹³ Rather, it developed within a particular social and historical context that explicitly took into account existing religious values and institutions. For example, "John Locke's writings explicitly discuss the relation between property and Christianity."⁹⁴ Thus, although existing concepts of property law could have been used in the *Lyng* case to grant the Indian people use rights on a first in time basis (e.g., a perpetual easement for cultural use), the Court scoffs at the idea that the Indians' religious practices could impose a permanent servitude on the land. Singer believes that in order to "combat the conservative nature of common sense judgments, we must subject those judgments to critical evaluation by focusing on the underlying power structures that form the context within which those judgments are made."⁹⁵ Presumably, this type of critical inquiry would help ensure that Native cultures are not penalized through interpretations of property law that negate their own values and traditions.

C. Developing an Account of Distributive Justice

Questions of distributive justice focus on the proper patterns of ownership for a society, although often little attention is given to the particular package of rights, liberties, and powers that owners should have over the goods in their possession. There are a number of approaches to determining the correct structure of ownership. One view is that ownership is a single, monolithic bundle of rights that must be held together if individual ownership is to be recognized at all. Another view is that the bundle of rights, liberties, and powers associated with property can be fully disassembled into component parts, each of which could be allocated or traded separately for the optimal outcome. A third view, offered by philosopher John Christman, is that different aspects of property rights perform different functions and serve different individual and social interests.⁹⁶ Therefore, ownership rights should be divided into separate categories which combine associated rights for a particular purpose. For example, Christman would differentiate control rights (the right to use, possess, manage, alienate, consume, or modify an asset) from the right to transfer or gain income from an asset.⁹⁷

Under any of these views, a pervasive question is whether and how far the government may venture in regulating property rights to achieve some optimal social goal. Distributive justice implies that all citizens are entitled to a certain minimum or threshold allocation of resources, but it is unclear whether such justice can be gained by interfering with the existing property rights of others.

Another question, drawing on Robert Nozick's analysis in *Anarchy, State and Utopia*, is whether it is relevant in assessing the justice of an existing regime

93. *See id.* at 1830.

94. *Id.* at 1836 (citing JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 29 (Oskar Piest ed., 1952)).

95. *Id.* at 1841.

96. *See* John Christman, *Distributive Justice and the Complex Structure of Ownership*, 23 PHIL. & PUB. AFF. 225 (1994).

97. *See id.* at 231-35.

to consider not only the distribution it currently embodies, but also how that distribution came about.⁹⁸ In other words, is historical context relevant to the determination of whether an existing distributional scheme is just? Historical arguments for property rights maintain that whether or not a holding or set of holdings is just, that is whether we have a moral right or entitlement to our holding, depends on the moral character of the history that produced the holdings. End-state arguments, on the other hand, maintain that the justice of holdings, and our rights to them, depend not on how they came about but rather on the moral character of the structure or pattern of the set of holdings of which they are a part. Under this argument, we need only a “current time slice” of the set in order to morally evaluate the set and its component holdings.

Of course, there are many related inquiries. For example, in cases of historical injustice, should we provide reparations to the victims or their descendants? Are “reparations” consistent with “compensatory justice,” in the sense that they alleviate any further inquiry into ongoing distributions of resources within society?

With respect to Native peoples, the questions are particularly troubling. The “equal justice” rhetoric often evokes the notion that all citizens are entitled to a basic set of goods and rights. If citizens have these rights—and presumably the Constitution is partly designed to provide this—then there is no further argument for special rights or different entitlements among distinct groups. This notion of equal citizenship does not address Native peoples’ desire for recognition of their distinctive status as sovereign nations, and the special rights that stem from that status. The dispossession of Native peoples from their lands was an act of colonialism designed to forcibly dismantle the Native peoples’ existing governmental systems and supplant them with those of the conquering nation. Looking back, we may be critical of certain actions taken by the politicians of that time, particularly the more grotesque acts of genocide and warfare. However, we rarely question the right of contemporary citizens to reside on the lands that were forcibly taken from Native people. In fact, citizen outcry is at its strongest when the courts recognize “ancient” property rights stemming from treaties or federal statutes such as the Nonintercourse Acts, which were illegally breached. Few non-Indians really think it would be just to give portions of New York state back to the tribes, even though the tribes may possess a legal right to such land.⁹⁹

Americans have accepted a certain mythological belief about the birth of their nation, one which excuses the harsh realities of conquest in favor of a view that Indians did not really have property rights or governmental systems that were equivalent to those of the Europeans. Therefore, unlike Russia’s conquest of its neighboring countries, the conquest of American Indian people is depicted as being more of a civilization campaign. The view today is often that Indian

98. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

99. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (invalidating conveyance of land from Oneida Tribe to State of New York under a 1795 agreement that violated the Trade and Intercourse Act of 1793).

people are much better off after European conquest than they would be otherwise. The gifts of technology—the automobile, internet, television, and VCR—are more than ample compensation for the loss of rights to wander aimlessly over vast expanses of land.

This mythology is supported by philosophical accounts, such as John Locke's, that justify the superiority of individual property rights based on efficiency and productivity. It is supported by common law legal principles that elevate individual property rights over group claims to land, fish, water, and other resources. It is supported by a script that appears in countless movies, novels, and even Supreme Court opinions about how the West was won and who the good guys are. But most troubling of all, maybe it is supported by us—the scholars who are charged with teaching, thinking, and writing about these things—when we accept the existing property rights model as the norm and force ourselves to think of creative arguments for why Native peoples' rights are as deserving as non-Native peoples' rights. Maybe we have it all turned around and should adopt a different lens to analyze the justice of the Anglo-American property system.

CONCLUSION

As this essay has demonstrated, the debate over property, wealth, and inequality has important implications for Native people and requires a conceptual approach that highlights the need for intercultural justice and holds promise for a more flexible and fair approach to this debate. In his masterful work on Native religion, *God is Red*, Vine Deloria, Jr. writes, "Within the traditions, beliefs, and customs of the American Indian people are the guidelines for mankind's future."¹⁰⁰ It may be that some of the lessons needed to heal this country of the wounds of the past reside in Native traditions. The American institution of property has been used to dispossess Native peoples from their lands and autonomy, to disenfranchise African-Americans of their human rights and to divest Mexican-Americans from their treaty-guaranteed rights under the Treaty of Guadalupe Hidalgo. This is the time to generate an intercultural dialogue on justice which highlights the need to redress this painful past. Vine Deloria concludes his book by emphasizing the centrality of Native belief in shaping the future of this land we call America:

Who will find peace with the lands? The future of mankind lies waiting for those who will come to understand their lives and take up their responsibilities to all living things. Who will listen to the trees, the animals and birds, the voices of the places of the land? As the . . . peoples . . . rise and begin to claim their ancient heritage, they will discover the meaning of the lands of their ancestors. That is when the invaders of the North American continent will finally discover that for this land, God is Red.¹⁰¹

100. VINE DELORIA, JR., *GOD IS RED* 300 (1973).

101. *Id.* at 301.

THE MANY COSTS OF DISCRIMINATION: THE CASE OF MIDDLE-CLASS AFRICAN AMERICANS

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A century ago the pioneering social psychologist, William James, noted that there is no more serious punishment for human beings than social isolation and marginalization.¹ An “impotent despair” often develops among those who are isolated and treated as less than human in social interaction. In the last two decades social scientists have documented the severe effects that marginalization and dehumanization have on the physical and emotional health of human beings in a variety of settings.²

Writing in the 1940s, Gunnar Myrdal underscored the link of discrimination to social isolation and caste-like marginalization.³ From this perspective, which we extend in this Article, the serious damage that discrimination inflicts on its victims includes marginalization and dehumanization, which in turn can have serious physical and psychological consequences. In various accounts, African Americans see themselves as “outsiders” excluded from recognition, important positions, and significant rewards in predominantly white settings.⁴ In the workplace, which is our focus here, they cite discriminatory training and promotions, racial threats and epithets, racist joking, subtle slights, and lack of social support.⁵

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1. See 2 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 430 (1890).

2. ROBERT H. LAUER & WARREN H. HANDEL, *SOCIAL PSYCHOLOGY: THE THEORY AND APPLICATION OF SYMBOLIC INTERACTIONISM* (1977).

3. See 1 GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 57-59 (1964).

4. See Sara E. Gutierrez et al., *Job Stress and Health Outcomes Among White and Hispanic Employees*, in *JOB STRESS IN A CHANGING WORKFORCE* 107, 108-11 (Gwendolyn P. Keita & Joseph J. Hurrell eds., 1994).

5. See LOIS BENJAMIN, *THE BLACK ELITE: FACING THE COLOR LINE IN TWILIGHT* (1991); PHILOMENA ESSED, *EVERYDAY RACISM: REPORTS FROM WOMEN OF TWO CULTURES* (1990); BOB BLAUNER, *BLACK LIVES, WHITE LIVES: THREE DECADES OF RACE RELATIONS IN AMERICA* (1989); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE CLASS EXPERIENCE* (1994); MARGARET AUSTIN TURNER ET AL., *OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING, URBAN INSTITUTE REPORT 91-9* (1991); Lawrence Bobo & Susan A. Suh, *Surveying Racial Discrimination: Analyses from a Multiethnic Labor Market*, in *PRISMATIC METROPOLIS: INEQUALITY IN LOS ANGELES* 523 (Lawrence D. Bobo et al. eds., 2000).

Over the last decade very little systematic, in-depth research has been conducted in the social and health sciences on the personal or family costs of racial exclusion and lack of social integration in the workplace.⁶ The early research exploring racial differences in health primarily blamed African Americans' biological characteristics for the high morbidity and mortality rates in their communities.⁷ Today, much public health research similarly focuses on the supposed deviant lifestyles of African Americans as the cause of their unique health problems.⁸ From our perspective, there needs to be a renewed social science focus on the costs of racial animosity and discrimination to African Americans, to other people of color, and to U.S. society generally. In this Article, we begin this major project by describing and analyzing the character and range of racial discrimination's costs by examining the African American experience in workplaces. Our exploratory research questions are the following: Is there a link between reported workplace discrimination and personal stress for African Americans? If so, what are the psychological and physical consequences of that racially related stress? In addition, what are the family and community consequences of that racially related stress? Finally, what are the broader implications of these findings for questions of racial discrimination and hostile racial climates in U.S. workplaces?

I. INTEGRATION AND A HOSTILE RACIAL CLIMATE

One might query what is the legal and constitutional relevance of our research about the consequences and effects of everyday racism. We argue here that many U.S. workplaces cause great harm to black workers, and probably to other workers of color. Although the legal standard for proving a "hostile work environment" was originally extended from racial discrimination cases to sexual discrimination cases,⁹ the courts have thus far not allowed the kind of evidence to demonstrate a hostile racial climate that is currently allowed to demonstrate a hostile sexual climate. In *Faragher v. City of Boca Raton*,¹⁰ the Supreme Court observed: "Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."¹¹

At this point in time, although the legal standards are ostensibly the same for proving hostile racial and sexual climates, the courts tend to be more lenient in the evidence they allow to prove hostile sexual climates than they are in the case of evidence for proof of hostile racial climates. This tendency for leniency may

6. See Gutierrez et al., *supra* note 4, at 110.

7. See SUSAN L. SMITH, *SICK AND TIRED OF BEING SICK AND TIRED: BLACK WOMEN'S HEALTH ACTIVISM IN AMERICA, 1890-1950*, at 6 (1995).

8. See *id.* at 169.

9. See *Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 66-67 (1986).

10. 524 U.S. 775 (1998).

11. *Id.* at 787 n.1.

be due in part to the fact that while two female Supreme Court justices (particularly Ruth Bader Ginsberg) actively rule to protect the rights of women, and in so doing set legal precedents for the lower courts, African Americans have no strong voices or allies on the high court. Only Justices Ruth Bader Ginsberg, John Paul Stevens and Stephen Gerald Breyer have sometimes acted as "allies" to African Americans in their decisions. Justice Clarence Thomas is the only person able to know first hand what it is like to be an African American, but as yet he has failed to strenuously represent the needs or protect the interests of African Americans.¹²

We see no reason that this workplace standard should diverge, for, as we show below, many workplaces can be very hostile and damaging for African Americans. Not only is workplace integration a potential *cause* of stress for African Americans, they are also not adequately protected by the law in these often hostile environments. In 1993, in *Harris v. Forklift Systems, Inc.*,¹³ the Supreme Court decided that a victim of sexual harassment did *not* have to prove "severe psychological injury" in order to be compensated for sexist discrimination. Writing for the majority, Justice Sandra Day O'Connor made it clear that a hostile sexual climate could be demonstrated by evidence of a string of humiliating actions or offensive comments by an employer

whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.¹⁴

Thus, the court determined that a single major act of discrimination is not necessary to prove sexism in the workplace. Continuing patterns of minor acts are sufficient. In contrast, in cases alleging a hostile racial climate, African Americans and other people of color attempting to remedy racial discrimination in the workplace are subject to a much more stringent burden of proof. Moderately derogatory racial comments made over time are generally not enough.

Under the *Harris* standard, harassing conduct need *not* have caused serious psychological distress, but it had to be "severe or pervasive enough to . . . alter the conditions of the victim's employment."¹⁵ A distinction was also to be made between physically threatening behaviors and "mere offensive utterance[s]."¹⁶ In *Faragher*, the Supreme Court further clarified this standard, explaining that

12. See, e.g., Rudolph Alexander, Jr., *Justice Clarence Thomas's First Year on the U.S. Supreme Court: A Reason for African Americans to Be Concerned*, 27 J. BLACK STUD. 378 (1997) (summarizing Justice Thomas's opinions in cases relevant to issues of race and racism during his first year on the Court).

13. 510 U.S. 17 (1993).

14. *Id.* at 23.

15. *Id.* at 21-22.

16. *Id.* at 23.

the *Harris* factors should serve as a filter to eliminate complaints regarding "ordinary tribulations of the workplace" such as "occasional teasing."¹⁷ The Second Circuit was correct, according to the *Faragher* Court, in holding that statutory relief should *not* be given for "episodic patterns of racial antipathy," but only for "incidents of harassment. [that] occur . . . with a regularity that can reasonably be termed pervasive."¹⁸ Thus, under *Faragher*, it is left up to the courts' discretion to decide when a company or defendant should be held liable for allowing a hostile environment to exist. It is also up to the courts to determine when that hostile environment is "pervasive as to alter the conditions of the victim's employment."¹⁹ Often what may be a hostile racial environment to most people of color is not regarded as such by courts on which Americans of color are not significantly represented. As presented in our data below, many middle class African Americans report work environments where harassment and discrimination reshape the conditions of work.

In one 1996 case, *Aman v. Cort Furniture Rental Corp.*,²⁰ the U.S. Court of Appeals for the Third Circuit decided that white supervisors and coworkers' repeated use of terms such as "another one," "one of them," and "poor people," in referring to two black employees constituted racial "code words," which created a "complex tapestry of discrimination" for which the company was liable. The court recognized that subtle discrimination is constitutive of a hostile workplace.²¹ The standards the court asserted for proving a hostile workplace were that the employee suffered intentional discrimination, that the treatment was pervasive and regular, that the discrimination detrimentally affected a particular employee, and that the discrimination would also detrimentally affect "a reasonable employee in a similar situation."²² These four standards are similar to those set forth in the hostile sexual climate cases.

Most recently, however, it seems that the courts are backpedaling on issues regarding racial discrimination.²³ For example, in a case heard in the California Court of Appeals, *Etter v. Veriflo Corp.*,²⁴ frequent racist epithets directed at a black man were not "severe or pervasive" enough to warrant legal remedy. Etter alleged that his supervisor directed toward him and other black employees racially derogatory terms, among them "Buckwheat," "Jemima," and "boy," and that she mocked supposed black pronunciation of certain words. However, the court asserted that Etter was referred to as "Buckwheat" by his supervisor "only" twice, and also noted that Etter could not remember the precise dates when his

17. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

18. *Id.* at 787 n.1 (citing *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987)).

19. *Id.* at 786.

20. 85 F.3d 1074 (3d Cir. 1996).

21. *See id.* at 1082-84.

22. *Id.*

23. *See* Steven Keeva, *A Bumpy Road to Equality: Panelists Say Courts Are Backpedaling on Minority Issues*, 82 A.B.A. J. 32 (1996).

24. 67 Cal. App. 4th 457 (Ct. App. 1998).

supervisor called him “boy.”²⁵ Further, the court opinion referred twice to the fact that Etter laughed at the racially insulting comments of his supervisor, implying that the negativism of racist comments was only “in the head” of the victim and thus legally benign.²⁶ In fact, Etter may have laughed nervously or only in an attempt to get along with his boss at the time, a common report of black employees.²⁷ The *Etter* court reaction reminds one of Justice Henry Brown’s opinion *Plessy v. Ferguson*:²⁸

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.²⁹

Here the Chief Justice and his associate judges, all white, explicitly say that it was only Plessy’s *perception* that he faced humiliating segregation. As the white justices saw it, any feelings by Plessy or other African Americans that whites saw them as inferior were just in their heads—a classic example of blaming the victim, highlighting the pervasiveness of extreme antiblack racism at the turn of the century.

The *Etter* court implied a similar view of African Americans’ experiences with discrimination in that they found it relevant to their decision that Etter had previously filed discrimination charges against another employee. The likely reason for the court to mention this fact was to imply that Etter was overly sensitive, or “paranoid,” or was using his racial classification for the financial gain that might be won through a successful discrimination suit.

The jury in *Etter* was instructed to consider whether “a reasonable person of the Plaintiff’s race would have found the racial conduct complained of to be sufficiently severe or pervasive to alter the conditions of the person’s employment and create a hostile or abusive working environment.”³⁰ However, one may question whether a predominantly white jury, or a white judge, is able to determine what is “reasonable” for an African American plaintiff. Social science research has shown that very few whites have any significant understanding of the depths and severity of the everyday racism faced by the

25. See *id.* at 461-62.

26. See *id.* at 461.

27. See FEAGIN & SIKES, *supra* note 5, at 135-222.

28. 163 U.S. 537 (1896).

29. *Id.* at 551.

30. *Etter*, 67 Cal. App. 4th at 460.

majority of black Americans.³¹ The *Etter* court, in deciding that the plaintiff's experiences were merely "episodic," and not "pervasive," may have failed to understand the severity and impact of those experiences for black employees. One might speculate, based on the relative success of such cases regarding gender, that had *Etter* been a white female charging a sexual hostile workplace environment, the same number and severity of comments might have been enough for the court to find for the plaintiff. We will discuss possible reasons for this "selective sympathy" later in the paper.³²

In this Article we show how damaging the racial work climate can be, and why the courts need to take African American reports of a hostile racial work environment seriously. African Americans and other plaintiffs who allege discrimination must show how their workplaces actually do harm. Here we provide some clues on how to gather and present such evidence. The type of evidence we have gathered clearly shows how and why workplace climates can be hostile.

Racial integration has not worked well for African Americans, as evidenced by the continuing huge inequalities in income, education, and life expectancies between African Americans and whites. On the average, black families have an income of only about sixty percent of that of white families and family wealth is only about ten percent of that of white families.³³ Additionally, on average white Americans live about six to seven years longer than black Americans.³⁴ A major problem with racial integration, as it has operated so far, is that it has mixed varying numbers of people of color into predominantly white institutional settings without giving them enough power to alter those settings or enough resources to significantly improve their material standards as a group. As it is practiced and implemented, racial integration in the workplace has caused many black Americans much anger and pain. Roy Brooks has documented the limitations of current integration, suggesting that African Americans might do better to practice "limited separation," for their economic, physical, and psychological well-being.³⁵ Racial integration, as it has been implemented in U.S.

31. See JOE R. FEAGIN & HERNÁN VERA, WHITE RACISM: THE BASICS 135-61 (1995); FEAGIN & SIKES, *supra* note 5, at 337-45.

32. "By the phenomenon of racially selective sympathy and indifference I mean the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group." Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976). While this concept is relevant, we see it as grounded in the "color blind" approach that is part of "whiteness." Whites are most often not conscious that they are exercising "selective sympathy," but think that they are in fact treating everyone the same.

33. See JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, RACIAL AND ETHNIC RELATIONS 236-90 (1999).

34. See JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 196 (2000).

35. ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY (1996).

society, is at best, one-way assimilation into a white-framed culture and institutions. This haphazard mixing is not the appropriate standard for racial integration designed to undo past wrongs.

In order to have real integration rather than one-way assimilation, African Americans and other people of color must be given the same opportunity as whites to change the contours of the workplace by their presence in it – hence requiring two-way (or more) assimilation. At the very least, they must not be required to become “whitewashed” and thus to give up significant parts of their identity in order to be accepted as coworkers, employees, and supervisors. Recent cases involving language issues for Latinos illustrate that these Americans of color are willing to make some concessions to be integrated into workplaces, but not to give up their language—a critical carrier of their culture—just because whites *arbitrarily* insist that they do so.³⁶ The parallel question is how much should African Americans have to give up in order to assimilate to historically white workplaces and other institutional settings? Clearly, they are willing to make concessions, but not to suffer nearly as much as they must under current circumstances.

The goal of real integration is much more than one-way assimilation into the workplace. As we see it, the goal should be two-way accommodation. Whites need to make major adaptations to those entering their institutions. They need to allow full incorporation into the workplace and give up racist practices, including the many practices that create a hostile climate. They need to change the number of employees to create a critical mass of African Americans and other workers of color. In defense of the critical-mass argument Richard Delgado posits that middle-class African Americans, because they are often alone in their workplace, are by necessity one-way assimilationists.³⁷ Because of their small numbers, African Americans often have little power to change the culture of the workplace and thus create two-way integration.

Most of our study participants are among the most economically successful middle and upper-middle class African Americans. These middle-class African Americans have often been viewed as having achieved the American dream like the middle classes of white ethnic groups before them.³⁸ Ironically, integration into the white workplace has in many cases created stressful situations for African Americans. For example, many of the first African Americans to integrate white workplaces were assigned to racialized jobs, such as positions as “community liaisons” or heads of affirmative action compliance departments. In these positions, they served to calm the potentially disruptive African American communities of the late 1960s, and many have been subsequently

36. See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 986-91 (1995).

37. See generally Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991).

38. See WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 124-26 (1978); THOMAS B. EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991).

unable to move out of those jobs.³⁹ Accordingly, because the African American middle class was to a significant degree politically facilitated, it is vulnerable to political changes that make economic attainment more difficult.⁴⁰ For individual middle class African Americans, workplace integration may be accompanied with forced assimilation, everyday discrimination, and the sense of being constantly watched and outvoted.⁴¹ Indeed, workplace integration has currently been primarily one-way—African Americans and other people of color have been required to accept white norms without being given the power to affect the workplace culture.⁴²

Nathaniel R. Jones, a judge in the 6th Circuit Court of Appeals remarked that it seems that Justice Harlan's statement in his dissenting opinion in *Plessy*, that "justice is colorblind," is now being used against African Americans.⁴³ Several legal scholars have suggested race-conscious ways that standards might be changed to make it easier to show the damage caused by hostile racial workplaces. Barbara Flagg has discussed a situation that exists in predominantly white workplaces which she calls the "transparency phenomenon."⁴⁴ Because whites are generally unaware of race, they are not conscious that decision-making in the historically white workplace that appears "neutral" often benefits whites and disadvantages people of color. We suggest that this type of discrimination, which automatically advantages whites and disadvantages people of color but is nonetheless thought of as "neutral standards," is better referred to as "woodwork racism" because it is not transparent. Rather, it is commonplace, tough, and real.

Flagg suggests that instead of a disparate treatment test for racial discrimination, which relies on proof of intentional discrimination, courts should consider finding employers liable for failure to create a culturally diverse workplace environment that imbeds the sometimes divergent norms of newly integrated groups. Flagg suggests two possible new standards, a "foreseeable impact" approach and an "alternatives" approach.⁴⁵ Both approaches would make it necessary for courts to consider the transparency phenomenon in deciding what constitutes a racially hostile workplace. Flagg advocates the alternatives approach, in which a historically and predominantly white workplace likely means white norms of decision-making, and thus requires strict judicial scrutiny. The employer is then responsible for explaining the criteria used in the

39. See generally SHARON M. COLLINS-LOWEY, *BLACK CORPORATE EXECUTIVES: THE MAKING AND BREAKING OF A BLACK MIDDLE CLASS* (1997).

40. See generally *id.*

41. See Anthony J. Marsella, *Work and Well-Being in an Ethnoculturally Pluralistic Society: Conceptual and Methodological Issues*, in *JOB STRESS IN A CHANGING WORKPLACE* 147, 148-50 (Gwendolyn P. Keita & Joseph J. Hurrell eds., 1994).

42. See COLLINS-LOWEY, *supra* note 39, at 142.

43. See Keeva, *supra* note 23, at 32.

44. Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2012 (1995).

45. See *id.* at 2039-48.

particular workplace standard that led to the suit, after which the plaintiff may propose alternative criteria that would not have a disparate impact on the employee of color.⁴⁶

Another race-conscious solution to the difficulty of proving a racially hostile workplace has been suggested by Charles Lawrence III. Lawrence asserts that the courts' reliance on proof of intent and a show of individualized fault should be replaced with a "cultural meanings" standard.⁴⁷ Such a standard would take into account the unconscious and half-conscious discrimination practiced every day by whites who have grown up in a racist society. Lawrence advocates that legal scholars might look to social science research to offer evidence of the racially derogatory cultural meanings of seemingly "neutral" acts.⁴⁸ Although he admits that his approach will not be readily accepted and easily applied, and that it is optimistic in its challenge of commonly held beliefs, Lawrence's insights might be useful in creating a new standard for judging the "reasonableness" of African Americans' complaints of discrimination in their workplaces. Their longterm experience and collective memory must be factored into any meaningful legal approach that tries to judge hostile racial climates.

This Article contributes to the creation of this new standard by describing the character and impact of hostile workplace environments endured by many middle class African Americans, and the severe physical and psychological effects this workplace climate can have on their health and well-being. Some of the most harmful treatment by white perpetrators that is described by our respondents may be half-conscious or even unconscious. In line with Flagg's transparency phenomenon, it is our suggestion that, until true racial integration is attained in predominantly white workplaces (with its impact on white attitudes and behavior), most of these places have the potential to be hostile to black Americans and other workers of color.

The transparency phenomenon should also be applicable to the judicial system, which ordinarily and routinely operates according to white norms due to the predominance of white judges, prosecutors, and juries in most court systems. For example, a recent Amnesty International report on the U.S. justice system reported that in 1998 almost all (1,816 out of 1,838) of the district attorneys and similar officials with the power to make decisions about the death penalty were white. The report also cited evidence on the use of peremptory challenges by prosecutors to keep juries as white as possible.⁴⁹ Flagg does not believe that transparency applies to "maleness" as it does to "whiteness" in the workplace.⁵⁰ This could perhaps be part of the reason that women have been more successful in proving hostile sexual workplace climates in the courts. Almost every white

46. *See id.* at 2044.

47. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* 39 STAN. L. REV. 317, 378-88 (1987).

48. *See id.* at 358-59.

49. *See* AMNESTY INTERNATIONAL REPORT, UNITED STATES OF AMERICA: RIGHTS FOR ALL 109-11 (1998).

50. Flagg, *supra* note 44, at 2012-13, 2012 n.9.

male judge and jury member has some close contact with a woman, whether she be his mother, daughter, wife, or friend. Thus, most will have some idea of what a "reasonable woman" might find offensive, as well as some sympathy toward a white woman. However, evidence of racial hostility in white workplaces is also usually assessed by white juries and judges, and that evidence is often considered to be merely the "perceptions" of "oversensitive" African Americans. Thus, the test presented by the courts, in which the standard of "a reasonable person of the plaintiff's race" is invoked, lacks meaning. Most white people have very little understanding of what African Americans' experience in white workplaces is like. The purpose of this Article is to contribute to a more race conscious standard for assessing the damage often done to African Americans in white workplaces.

II. RESEARCH METHODS

To begin this serious sociological examination of the perceived costs of racial discrimination, we conducted five exploratory focus groups with economically successful African Americans, two in the Midwest and three in the Southeast.⁵¹ We secured thirty-seven participants, sixteen in the Midwest and twenty-one in the Southeast. Of those who reported their age, the majority (seventeen) were between thirty-one and forty years of age, with five between twenty-one and thirty and twelve between forty-one and sixty. Among those reporting their education, most (nineteen) had pursued graduate work beyond a four year college degree, while thirteen others had completed some college work or earned a college degree. Only one reported not having gone to college. Among those who reported family income, the majority (twenty-five) had an income that was \$31,000 a year or more, with fourteen reporting income above \$50,000. Eight listed a family income at \$30,000 a year or less. The respondents reported a variety of occupations, mostly in professional or managerial positions.⁵² Twenty-seven were female, and ten were male. In the analysis, we quote from about eighty percent of the focus group participants.⁵³

51. This exploratory research utilized a sample of middle-class African American men and women. The findings suggested by our research should be extended to include both working class and under—and unemployed African Americans. Also, this study might be used to identify topics for quantitative public health research studies.

52. The participants included a dental assistant, several nurses, a community health specialist, a psychologist, a counselor, several government administrators, a planner, a social services coordinator, a sheriff, several postal service managers, teachers, a college admissions advisor, a college residential coordinator, two college students, several secretaries, a purchasing agent, and several corporate managers and engineers. Three participants held skilled blue-collar jobs.

53. We used black moderators to conduct the focus groups. We are indebted to John McKnight for moderating three groups.

III. RACIAL DISCRIMINATION IN THE WORKPLACE: THE SOCIAL GENERATION OF ANGER AND RAGE

In the last decade much argument has been directed at what has been termed "black paranoia" about racism. For example, Dinesh D'Souza argues that middle class African Americans move too quickly to see racism and that black rage is a "dysfunctional aspect of black culture, a feature mainly of middle-class African American life" and that this rage represents "the frustration of pursuing unearned privileges" of affirmative action.⁵⁴ In effect, this perspective suggests that African Americans have mainly themselves to blame for mental health problems associated with their racial histories.

In contrast, other researchers have found that African American "paranoia" is actually a healthy response to recurring experiences with racial discrimination. Some researchers call this response "cultural mistrust," which is a suspicion of whites that is adopted by African Americans for survival.⁵⁵ Others have rejected the use of terms such as "mistrust" or "paranoia," which have implications of pathology, and instead use the term "racism reaction" to describe the protective orientation individual African Americans often assume in interactions with whites.⁵⁶ Research suggests that health-care providers should be familiar with this black response in order to avoid misdiagnoses of pathological paranoia.⁵⁷ This precaution is particularly important given the fact that, although African Americans are less likely than whites to seek mental health care, those that do seek such care are more apt to be diagnosed with more serious mental illnesses.⁵⁸

In a now classical study, psychiatrists Grier and Cobbs examined the extent to which individual rage and depression among African Americans were determined by racial discrimination and asserted that black mistrust of whites is a reasonable attitude based on their experiences with racial discrimination.⁵⁹ In

54. DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 491 (1995).

55. Francis Terrell & Sandra Terrell, *An Inventory to Measure Cultural Mistrust Among Blacks*, 5 W. J. BLACK STUD. 180, 180 (1981).

56. Chalmer E. Thompson et al., *Cultural Mistrust and Racism Reaction Among African-American Students*, 31 J. C. STUDENT DEV. 162, 163 (1990).

57. See *id.*; Charles R. Ridley, *Clinical Treatment of the Nondisclosing Black Client: A Therapeutic Paradox*, 39 AM. PSYCHOLOGIST 1234, 1244 (1984).

58. See Stephen I. Abramowitz & Joan Murray *Race Effects in Psychotherapy*, in *BIAS IN PSYCHOTHERAPY* 215-55 (Joan Murray & Paul R. Abramson eds., 1983); Raymond M. Costello, *Construction and Cross-Validation of an MMPI Black-White Scale*, 41 J. PERSONALITY ASSESSMENT 51 (1977); Ezra E. H. Griffith, & F.M. Baker, *Psychiatric Care of African Americans*, in *CULTURE, ETHNICITY, AND MENTAL ILLNESS* 147-73 (Albert C. Gaw ed., 1993); Billy E. Jones & Beverly A. Gray, *Problems in Diagnosing Schizophrenia and Affective Disorders Among Blacks*, 37 HOSP. & COMMUNITY PSYCHIATRY 61, 65 (1986); Jerome M. Sattler, *The Effects of Therapist-Client Racial Similarity*, in *EFFECTIVE PSYCHOTHERAPY: A HANDBOOK OF RESEARCH* 252-90 (Alan S. Gurman & Andrew M. Razin eds., 1977).

59. See generally WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1968).

this study, Grier and Cobbs drew on extensive clinical experience with black patients and concluded that the treatment of enraged African Americans must center on experiences with discrimination in the workplace and other sectors of society in order for psychological healing to take place. They noted that black

[p]eople bear all they can and, if required, bear even more. But if they are black in present-day America they have been asked to shoulder too much. They have had all they can stand. They will be harried no more. Turning from their tormentors, they are filled with rage.⁶⁰

More recently, Cobbs reiterated the point that rage against discrimination is commonplace among African Americans, but for many, continues to be turned inward.⁶¹ Silent, all-consuming rage can lead to inner turmoil, emotional or social withdrawal, and physical health problems.

African Americans working or traversing historically white places often feel frustration, anguish, anger, or rage—all of which may be expressed in their words, the tone of their comments, or the character of facial expressions. All the focus group respondents indicated in one way or another that they suffer substantial and recurring stress and frustration because of racially hostile workplaces. As one Midwestern respondent put it, her symptoms of stress do not happen “on weekends or after five o’clock.” In the focus group interviews there is a consensus that much of their life-damaging stress at work does not come from the performance of the job itself but from hostile work environments.

Some social science research shows that a person’s job satisfaction is rooted in how much work contributes to a sense of control and to self-esteem, in how much co-workers and supervisors are helpful in supporting one’s work, and in whether rewards are meritocratic.⁶² Black employees have difficulty doing their best work when conditions and rewards are inequitable. Recent data demonstrate that African Americans continue to be rewarded economically at lower levels than do white Americans. The broad economic costs of being black include continuing disparities in income, wealth, and occupational position.⁶³ Some portion of these disparities stems from the accumulating impact of discrimination over centuries, while another portion comes from the well-documented patterns of discrimination in contemporary employment settings.⁶⁴

Black workers’ lives are disrupted by lack of support and discrimination by

60. *Id.* at 4.

61. See Price M. Cobbs, *Critical Perspectives on the Psychology of Race*, in *THE STATE OF BLACK AMERICA* 1988, at 61-62 (Janet Dewart ed., 1988).

62. See ROBERT KARASEK & TÖRES THEORELL, *HEALTHY WORK: STRESS, PRODUCTIVITY, AND THE RECONSTRUCTION OF WORKING LIFE* 69-72 (1990); John Mirowsky & Catherine E. Ross, *The Consolation-Prize Theory of Alienation*, 95 AM. J. SOC. 1505 (1990); Catherine E. Ross & John Mirowsky, *Households, Employment, and the Sense of Control*, 55 SOC. PSYCH. Q. 217, 219-20 (1992).

63. See FEAGIN & FEAGIN, *supra* note 33, at 258-60; MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY* (1995).

64. See BENJAMIN, *supra* note 5; ESSED, *supra* note 5; FEAGIN & SIKES, *supra* note 5.

co-workers and supervisors; these encounters can become "life crises" with a serious health impact similar to that of life crises like the death of a loved one.⁶⁵ Recent research on 726 African American men and women showed that the amount of decision latitude they were allowed on their job was linked to the risk of hypertension. African American men who were given more control over decisions on their jobs had fifty percent *less* prevalence of hypertension.⁶⁶ However, many of our respondents discussed being excluded from decision-making. As the reader will see, an African American's attempt to compensate for this lack of control can lead to specific physical health problems.⁶⁷

In commenting on racially hostile or unsupportive workplace climates, some focus group participants described general feelings of frustration and anger, while others told of specific incidents that generated these feelings. A common source of anger is white use of racist epithets or similar derogatory references, which can trigger painful individual and collective memories. One black professional described her reaction to an incident with a white administrator:

I have felt, I have felt extremely upset, anger, rage, I guess you would call it? One incident that comes to mind happened in a social setting. I was with some, with my former boss and some coworkers and a man who ran, like, a federal program. And we were having dinner, and he made a comment, and he had been drinking *heavily*. And he referred to black people as "niggers" I'm sitting—he's there, and I'm here. . . . And as soon as he said it, he looked in my face. And then he turned beet red, you know? [Laughter] And I said, "Excuse me, what did you say?" And he just couldn't say anything. And then my boss, my former boss, intervened and said, "Now, you know, move his glass, because he's had too much to drink." And you know just making all these excuses. So, of course, I got up and left. I said goodnight, and left. And the next morning, the man called me and apologized. . . . His excuse was that he had been drinking, you know. And I said, "Well [gives name], we don't get drunk and just say things that we wouldn't otherwise say. You know, I don't get drunk and start speaking Spanish. [Laughter]. This was already in you, you know, in order for it to come out. [Voices: Exactly. Yeah, yeah.] I mean so, keep your apology, I'm not interested."⁶⁸

65. See KARASEK & THEORELL, *supra* note 62, at 71; Lydia Rapoport, *The State of Crisis: Some Theoretical Considerations*, in CRISIS INTERVENTION: SELECTED READINGS 22, 31 (Howard J. Parad ed., 1965).

66. See Amy B. Curtis et al., *Job Strain and Blood Pressure in African Americans: The Pitt County Study*, 87 AM. J. PUB. HEALTH 1297, 1300 (1997).

67. Sherman A. James et al., *John Henryism and Blood Pressure Differences Among Black Men II: The Role of Occupational Stressors*, 7 J. BEHAV. MED. 259 (1984).

68. Some quotes have been lightly edited. We deleted some filler words like "you know" and "uh" and corrected grammar in a few places. We have kept respondents anonymous by deleting or

Then she concluded with a comment on what she did with her anger:

I was so angered that I wanted to get him, you know? I was out to get him. I called his boss in [names city] . . . who is black, and informed him of what happened. Because he was referring to his boss, actually. . . . And he said, "Yeah, he's out with the other niggers." You know, so he's calling his boss a nigger! And I think his boss should know that!

Similarly, a secretary in the Midwest related an incident in which she had to explain the meaning of an epithet to her supervisor, who subsequently did nothing to reprimand the white employee who used the term:

A white individual in my department was talking to me, and he referred to me as "Buckwheat." My supervisor, when I reported it to her, told me that she did not feel that I looked like Buckwheat. Nor . . . did she understand what the term meant. Then she asked me to define it for her. She felt that [the term] was not derogatory. After I told her what it meant . . . she said "Well, you don't exemplify that, so I wouldn't worry about that." She also refused to talk to the individual.

The impact of racist epithets may be underestimated by many white observers. One older black psychologist told the first author that when he hears the epithet "nigger," in his mind's eye he sees a black man hanging from a tree. Individual and collective memories compound the damage of present-moment discrimination. The connection between hostile epithets and the brutality of racism are intimate parts of the collective memory of African Americans.

Robert Bellah and his associates have noted that communities "have a history" and "they are constituted by their past—and for this reason we can speak of a real community as a 'community of memory,' one that does not forget its past."⁶⁹ Collective recollections are not always positive: "Remembering . . . heritage involve[s] accepting . . . origins, including painful memories of prejudice and discrimination."⁷⁰ Past and present discriminatory actions—and the contending responses to that oppression—become inscribed in collective memory. The community passes along information from one generation to the next about how to deal with discrimination and the anger it causes. A nurse's assistant noted the importance of generational advice and collective memory: "Kindness will kill a person. My grandmother told me that so many times. 'Don't get upset. Don't fuss. Don't argue with them. Just smile at them.'" [Male voice: "That's true."] After this comment, a health care professional in the focus group spoke about her rage over a traumatic workplace incident with a white coworker. She partly attributed the hostility in their relationship to racial tensions in her workplace:

disguising names and places.

69. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 153 (1985).

70. *Id.* at 157.

Most of the time you can do that, but it comes that point where you just can't. They have backed you into a corner. It's like a mouse, if you back him into a corner he's going to come out. So, then you just explode. I had that to happen on the job and I hit this person. I physically, yes, I hit her. She's white and she called me a "bitch." [Moderator: After you hit her or before you hit her?] Before I hit her. That's why I hit her. She was abusive to the patients, and I had already had a conversation with her, with the supervisor. . . . [s]he cursed me, and I'm looking at my supervisor who was her friend. . . . Both of them are white, and this was her friend. You know, they would go out to lunch together, whatever. She cursed me in the patient area, and I'm looking to my supervisor for some kind of response to her. Well, after she didn't say anything to her, then I cursed her back. And then I thought well, "Okay, this isn't cool, let me just get away from the situation." And I went [to] the medication room just to separate myself.

Then she added this to complete the story:

Well, that wasn't good enough for that person. She had to come where I was and ask me a question that she could have asked the patient. And I wouldn't respond to her. I said I'm not going to talk to her when she just cursed me. She just cursed me, what's the point? So, then she said, "Well, you bitch." When she said that, I just really lost it and I was out of there and grabbed [her coworker] by the back of the hair and punched her in the mouth. Well, when that happened of course your job flashes before your face. It's like "God, I'm going to lose my job." Well, the supervisor had her back to us luckily. . . . I was angry with myself because I allowed this person to get me off my ground. She wasn't worth [it], I could have lost my job. She wasn't worth that and I was really angry with myself for allowing her to get me off my ground.

Many cases of discriminatory treatment entail a sequence of events which take place over time; they consist of more than one encounter. The white woman cursed the respondent, who responded in turn, triggering another curse by the white woman. The respondent was angry at her own actions because she lost control over her own space. When she finished her account, one man in the group added this: "There's no one answer to a question like that. Each situation warrants a different response. I think what helps us as being black now, we understand what these [white] people think." One consequence of racial oppression is the understanding one necessarily develops into the behavior of the oppressor, an effort and level of understanding usually not required of the latter.⁷¹ Some research has linked the stress caused by this bicultural stance African

71. See PETER BELL & JIMMY EVANS, *COUNSELING THE BLACK CLIENT: ALCOHOL USE AND ABUSE IN BLACK AMERICA* (1981); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Charles Lam Markmann trans., 1967).

Americans must take to increased vulnerability to illnesses.⁷²

A female supervisor in one focus group discussed the link between black rage and unfair promotion practices in workplace settings:

I think a lot of anger and rage comes in when we . . . feel like—like I have a friend, he's been with the company twenty years, and he didn't get a promotion. And he was well over-qualified. They gave it to a [white] guy who had been there only seven [years], and knows nothing. So, of course, I was kinda angry with the process, but it was because he was the ex-boyfriend of the girl who was doing the promoting. So he was upset about it. But I told him, I felt like this: "They can only tell you 'no' so many times. Keep applying for that position."

The anger over mistreatment is more than a matter of what happens to the black person as an individual. Rage over racism is also fueled by what happens to friends and family members. Collective memories of racism against all African Americans, as well as knowledge of specific discriminatory actions against particular friends and relatives, multiply racialized stress for African American individuals.⁷³

The seriousness of black rage over discrimination was made clear by a retired professor interviewed in a recent nationwide study of African Americans. Speaking to a question about the level of his anger toward whites because of discrimination (on a scale from one to ten), this man implicitly suggests the serious health consequences of rage:

Ten! I think that there are many blacks whose anger is at that level. Mine has had time to grow over the years more and more and more until now I feel that my grasp on handling myself is tenuous. I think that now I would strike out to the point of killing, and not think anything about it. I really wouldn't care.⁷⁴

IV. ANGER AND RAGE: ATTEMPTS AT REPRESSION AND CONTROL

The daily struggle against racial attacks and slights can be seen clearly in many aspects of the focus group transcripts. The intensity of the pressures are clear when the respondents speak of the means they use to cope with anger over racial discrimination. Resignation and reinterpretation of events are among the coping tactics. One respondent told of an incident in which a young black man came to her workplace to donate items to the service organization for which she

72. See, e.g., F. M. Baker, *The Afro-American Life Cycle: Success, Failure, and Mental Health*, 79 J. NAT'L MED. ASS'N 625, 630-31 (1987).

73. See ESSED, *supra* note 5; FEAGIN & SIKES, *supra* note 5, at 16-17; James S. Jackson & Marita R. Inglehart, *Reverberation Theory: Stress and Racism in Hierarchically Structured Communities*, in *EXTREME STRESS AND COMMUNITIES: IMPACT AND INTERVENTION* 353, 367-71 (Stevan E. Hobfoll & Marten W. de Vries eds., 1995).

74. FEAGIN & SIKES, *supra* note 5, at 294.

works. Her white boss asked the young man why he was donating, and the latter answered that he had grown up in the service organization, though in another location. The woman concluded the story:

And he [her boss] said "Oh, I will have to call him. I know the person who directs the organization down there. I'll have to tell him that you didn't end up in jail." And the guy just, he's like, "I don't . . . know quite how to take [that]." But he [her boss] says this [stuff] all the time.

Although the woman recognizes her supervisor's comments to be stereotypical, she tries to understand his ignorance:

I think that he just doesn't know any better. . . . I've come to grips with him, I've worked for him for many years. . . . I let him know that I don't like his comments and that they're inappropriate, but there's nothing I can do about it. But I just think he doesn't know any better.

This woman's workplace situation exemplifies that of many African Americans, who often find ways to attribute the behavior of white coworkers to things other than overt racism in order to be able to work with them on a daily basis. Contrary to white notions of African American "paranoia," most frequently struggle to find explanations other than racism for the negative behavior of many whites.⁷⁵

Some participants spoke of trying not to let their anger over racism take root deeply in their lives. One government employee discussed this approach to discrimination:

To never get upset. Not to let that rage consume you, and after, and it really takes a lot to be really thoughtful, and to get beyond that, and, and *try* to educate them [whites]. I, that's what I've found works for me. And it helps me not to go home and to have that just simmer in me—that I can just leave it.

Middle-class African Americans, who often have high levels of interaction with whites as coworkers, find various ways to "leave" their anger, and may use a combination of coping strategies for discrimination.⁷⁶ Extant research suggests that, before choosing a coping strategy, African Americans often reflect on the source of a white person's discriminatory behavior.⁷⁷ Some discuss methods of mentally or physically withdrawing from a hostile situation, while others verbally or physically confront discriminatory whites. Sometimes African Americans attribute racist behavior to ignorance and choose to educate whites as a response to discrimination, which can give a sense of empowerment. Yet others describe a "shield" they must use in order to protect themselves in white society. Many

75. See, e.g., D'SOUZA, *supra* note 54, at 491 (asserting that middle-class African Americans suffer from paranoia); ESSED, *supra* note 5; FEAGIN & SIKES, *supra* note 5, at 275-78 (discussing the other interpretations for discriminatory behavior that African Americans often consider first).

76. See FEAGIN & SIKES, *supra* note 5, at 273.

77. See JOER. FEAGIN & KARYN D. MCKINNEY, *THE COSTS OF RACISM* (forthcoming 2002).

discuss social networks, whether in the family, community, or church, as important buffers against the harmful psychological and physical effects of discrimination.⁷⁸

Many African Americans discuss the importance of "choosing one's battles" in regard to confronting racism. Most indicate they do not have the energy to confront each instance of discrimination.⁷⁹ However, repressing emotions can be problematical. A too-restrained response to one's anger over workplace problems can bring even more suffering because of the feelings of impotence, which in turn can contribute to stress-related illness.⁸⁰ Researchers Alexander Thomas and Samuel Sillen have suggested that finding some socially viable way of openly expressing anger at oppressors is better than self-derogation as a response to racial oppression.⁸¹

This sense of empowerment is linked to position and resources by one female professional:

I think that we're some empowered people sitting around the table, and so we can do that. I think that there's a lot of people that don't feel that they have the power to do that. There's a lot of African Americans who don't feel that they have the power. I've seen it in the kids. . . . I've seen it in the workplaces. They don't—and so that rage just builds up. I see it in black men. They don't feel that they have the power. . . . and older people. They really don't. And that's, I think the issue that, that really needs to be spoken to. We can do it because we've made up in our minds that we're going to educate them. . . . But what about those people that really have not, you know, are not, are not feeling this strength and energy? What about those, those *kids* that I see every day? And particularly again, if they are black males. . . . You see, a lot of people, I think a lot of our people end up in jail or dead because they don't have the tools . . . that we're talking about, that we use to, to deal with it.

Teaching whites becomes part of the strategy for dealing with anger over racism. Middle class African Americans, it is suggested, have more resources and strength to deal with racism in this and other ways than do other African Americans. The sense of lacking power to fight back or to bring about change is likely to be central to the continuing reality of discrimination for many African Americans.

A government supervisor in the Southeast noted his approach to handling anger from job discrimination:

You're always going to feel anger, I mean, obviously . . . [in the] simplest things sometimes. Because, just because, if you can look and tell, if it's a black man and white man thing. . . . So you're gonna feel

78. See FEAGIN & SIKES, *supra* note 5, at 294-307.

79. See *id.* at 281.

80. See KARASEK & THEORELL, *supra* note 62.

81. See ALEXANDER THOMAS & SAMUEL SILLEN, RACISM AND PSYCHIATRY 53-54 (1972).

anger, but the thing is, when you put that rage in there . . . number one, it's your job. You're gonna do certain things. But it's my health. And it's my life. So I'm not gonna put myself in a position where you're gonna get me to that point. I know when we were talking about psychological and physical things. I'm just not gonna let you put that—I can wake up in the morning time, and I know, I don't even have to open my eyes, I know I'm a black man. I don't have to tell me. *You* don't have to tell me. So when I sit there and, and take this—and say, I'm sitting across a table from a, in a meeting, and there's a superior, and they happen to be white. In this case, of course, they may do something that's going to get me upset, but like I say, it's their job. Or if they pass me over, and, all I can look in is the variables. . . . But I control how I feel about it. I can control whether or not it affects my health or not. So, that's why, when you say, as far as rage and anger, you know how to override it.

This man believes he has developed strategies to control the anger he feels from racial tensions at work. It is impossible to know to what degree his strategies are successful, but he perceives his need to monitor his anger constantly for fear the anger coming from workplace discrimination will affect his health. The constancy of being reminded of being black is part of what racism means in U.S. society. One can never escape this, and during encounters with whites in the workplace, one's racial identity is in the front of one's mind. Some anger over mistreatment is inevitable, and the overarching strategy is often to "choose one's battles" and assess each situation separately for the appropriate response.

In some cases whites may intentionally provoke black workers to see if they will react strongly. After the government supervisor spoke, a female voice added: "This is a set up. . . . You get into rage, they just say, 'See, that's why we didn't give [a promotion] to her.'" The ability to hold in one's anger and to control feelings is central to survival in a work world where strong reactions to animosity can affect one's job opportunities and economic success. Many African Americans must exert much effort to check emotions so as not to play into white stereotypes of black people being out of control. An engineer had also decided not to let rage have a negative affect on health: "So you see, these things like that, those things like that, those things make you upset . . . and the stress does make a difference, I think it probably takes five years off your life, to tell you the truth, if you let it get to you." An administrative secretary in the Midwest echoed this sentiment about how to deal with racially generated stress: "You learn how to deal with it. . . . You sit up there, and you be mad all day long and that's not good for you and you end up dead. I'm not dying from them."

A victim of discrimination frequently shares the account with family and friends in order to lighten the burden. African Americans often rely on their families and community institutions (e.g., churches) as part of their coping mechanisms for dealing with recurrent discrimination at work and elsewhere.⁸²

82. See, e.g., SAYDEL. LOGAN, *THE BLACK FAMILY: STRENGTHS, SELF-HELP, AND POSITIVE*

In several focus groups the participants repeatedly noted or underscored these critical sources of social support. One teacher commented on bringing the stress of racism home with her, "I think I bring it home with me, I do. But, I have a good partner here, who listens . . . and, you know, I tell him all the problems, when it's happened. And I get feedback from him. And I get it all out, and that, I think that's good."

Similarly, a male respondent in the Southeast said his wife was his major source of support in dealing with stress from racial animosity:

I'd say oftentimes I've brought it home. Because I don't share that stuff with my work group, but I can share it with my wife, and she'll listen and give me appropriate feedback, and help me get through that. And you know I get the bike out, and I'll ride, or take the kids and go somewhere, or take me a good, hot, steamy shower. And get a back rub, or something. [Others chuckle.] And that kinda thing. Settle for that!

Numerous focus group participants indicated that they told their families and friends about discriminatory events in employment and other settings, which accounts spread both knowledge and pain through social networks and communities.

Several respondents mentioned how their families of origin raised them to recognize and deal with racial hostility and discrimination. A secretary stated that:

I think my family is very supportive. . . . [m]y father is more like, "Maybe you should ignore it and turn the other cheek," where my mom is like, "Report it." You know, so I . . . get it from both sides. . . . I think these are things that I should tell them, and these are also things that they should relate to me about their experience so that I can distinguish what is racism, what is prejudice, and how to deal with it. . . . I think we have a lot of individuals today who don't even know [how to recognize racism]. . . . [s]omebody in that family should have brought that out to these individuals. . . . [t]his is important for families to sit around, and let them know. This is another way of communication to bring it out so they don't have to bring it into the workplace and be angry.

Another woman, a purchasing agent, agreed with this respondent, and added that her family "told us different stories that have happened to them, so we can distinguish between what is and what is not [racism] [t]hey give you an example of subtle prejudice and racism" Several parents in the focus groups noted the importance of preparing their children for racism and its torments and frustrations.

One should note the *cumulative impact* of racial animosity and discrimination reported throughout our interviews. This accumulating impact

likely accounts for much of the anger and rage expressed by the focus group participants. The problem is not just a particular racial incident but the steady pattern of incidents over long periods of time and across many life spaces. Recurring discrimination may eventually erode the coping skills of many African Americans and cause them increased illness or problems in families.⁸³ In one study, a retired schoolteacher in a southwestern city recounted her experience with a racist epithet yelled by a clerk in a mall shop, then characterized the many recurring incidents of racism as the "little murders every day" that have made her long life so difficult.⁸⁴ Particular instances of discrimination in workplaces or elsewhere may seem minor to some outside (especially white) observers, particularly if they are only considered in isolation. However, when blatant racist actions and overt mistreatment combine with discrimination in more subtle and covert forms, and when these discriminatory practices accumulate over weeks, months, and years, the effect on African Americans is more than what a simple summing of the impact of particular incidents might suggest. There is often a significant *multiplier effect* from recurring racial hostility on a person's work, health, and social relationships.⁸⁵

Although their specific strategies for dealing with racism differ, there was a general consensus among the respondents that the anger generated by racism in the workplace must generally be dealt with by African Americans themselves, who can expect little, if any, support from white coworkers and supervisors. A nurse described the lack of concern for racism shown by white supervisors:

I think that most supervisors, managers, [the] higher echelon knows about racism in the workplace. And I think some of them leave it up to lower managers to do something about it even when they discuss it, and some of them just leave it, period. And then some have diversity groups . . . or seminars or things . . . but racism is so prevalent I just think that it's going to be hard to get rid of.

The costs of racial discrimination encompass the time and effort put into dealing with that discrimination. The responses of African Americans to racial stress vary, with some using aggressive countering tactics and others withdrawing from the situation. Sometimes the stress forces the costly response of withdrawal. One woman, working in corporate administrative services, noted her response to harassment:

The way I deal with it is I try to stay out of the office as much as I can . . . even outsiders who come in the office, they can sense the air is tight. . . . [a]nd it's all because of our boss. And it's not just racial harassment, it's sexual harassment.

83. See ELAINE PINDERHUGHES, *UNDERSTANDING RACE, ETHNICITY AND POWER: THE KEY TO EFFICACY IN CLINICAL PRACTICE* (1989).

84. See FEAGIN & SIKES, *supra* note 5, at 54.

85. See Darielle Watts-Jones, *Toward a Stress Scale for African-American Women*, 14 PSYCHOL. WOMEN Q. 271 (1990).

Several female respondents described how racial marginalization at work was amplified by the sexist behavior of white male coworkers and supervisors.

Another woman, who now works at a college, described racially related stress and why she quit her previous job in a store:

When the black customers would come into the store to possibly return merchandise, and maybe not have a receipt to accompany that purchase, they were asked . . . "Do you think you could go home and find it [the receipt]? Well, when was it purchased?" They were denied adequate assistance. But when the white people would come into the store, it was like, "Oh, well, can I credit it to your [store credit account] or Visa?" . . . [I]t was always, with the black person, it's like, "Well, where did you buy it? Well, take it back to the store that you bought it from," although you can take any of that merchandise to any store, because that's policy. . . . I was just amazed by the kind of things that would occur. And that's a reason why I no longer work there, because I could no longer work for a company that discriminated against my race. . . . [T]hey did it blatantly and they really didn't care.

Whatever the source of stress at work, its consequences are serious. What is noteworthy about racial stress is that it generally comes on top of the other frustrations in the workplace. Note too that this woman's frustration and anger were generated by what was happening, not to herself, but to other African Americans.

V. DEPRESSION AND OTHER PSYCHOLOGICAL PROBLEMS

Long ago, in the 1960s the critic of racial colonialism, Frantz Fanon, argued forcefully that colonization causes the colonized serious psychological problems, because of the continual assaults it inflicts on their personalities.⁸⁶ Numerous studies have documented the harmful effects of workplace stress on the health of employees of any racial or ethnic group.⁸⁷ Although work is a primary source of stress for many individuals, some research shows that certain types of job stress are unique to the experiences of Americans of color, and may contribute to their facing unique physical and mental health challenges.⁸⁸ Certain social conditions, including racial inequality, blocked opportunities, and discrimination are major generators of pain and distress for individuals. Physical and mental health problems can stem from the stresses of discrimination.⁸⁹ Recent research has

86. See JOCK MCCULLOCH, *BLACK SOUL, WHITE ARTIFACT: FANON'S CLINICAL PSYCHOLOGY AND SOCIAL THEORY* 127-28 (1983).

87. See, e.g., Gutierrez et al., *supra* note 4, at 118.

88. See *id.* at 120; see also Marsella, *supra* note 41.

89. See generally Jewelle Taylor Gibbs & Diana Fuery, *Mental Health and Well-Being of Black Women: Toward Strategies of Empowerment*, 22 AM. J. COMMUNITY PSYCHOL. 559 (1994); Griffith & Baker, *supra* note 58; Vickie M. Mays et al., *Perceived Race-Based Discrimination, Employment Status, and Job Stress in a National Sample of Black Women: Implications for Health*

highlighted the need to take into account three dimensions in considerations of the role of stress in the lives of African Americans. The first is the individual-level interactions between race and health; the second, interpersonal relationships and health; and the third, societal factors, such as poverty and racism, that contribute detrimentally to African American health.⁹⁰ Research has found that African Americans are caught in economic, social, and political conditions that are harmful to their health.⁹¹ Mirowsky and Ross conclude that this pain and distress can take two psychological forms: being depressed, being demoralized, and feeling hopeless; and feeling anxiety, fear, and worry.⁹² Karasek and Theorell have shown that variations in control and socioemotional support at work predict variations in psychological depression.⁹³

Demoralization, anxiety, and anger over everyday discrimination are to be expected under the circumstances faced by African Americans in U.S. society, but they are nonetheless unhealthy at the levels experienced. A few recent research studies have touched on the relationship of discrimination to mental health problems. In addition to older studies of African Americans such as that of Grier and Cobbs, three recent studies of Mexican Americans have found that experience with discrimination is linked to higher levels of stress and psychological suffering, including depression and lower levels of life satisfaction.⁹⁴ An analysis drawing on the National Study of Black Americans has also suggested that recent experience with discrimination may be associated with poor mental health.⁹⁵

Often a worker of color finds he or she is one of few, or even the only person of that racial-ethnic background within their work environment. This status often does not allow them the social support that could help to alleviate workplace

Outcomes, 1 J. OCCUPATIONAL HEALTH PSYCHOL. 319 (1996); Charles B. Wilkinson & Jeanne Spurlock, *The Mental Health of Black Americans: Psychiatric Diagnosis and Treatment*, in ETHNIC PSYCHIATRY 13 (Charles B. Wilkinson ed., 1986).

90. See James S. Jackson & Sherrill L. Sellers, *African-American Health over the Life Course: A Multidimensional Framework*, in HANDBOOK OF DIVERSITY ISSUES IN HEALTH PSYCHOLOGY 301, 301-04 (Pamela M. Kato & Traci Mann eds., 1996).

91. See James S. Jackson & Monica L. Wolford, *Changes from 1980 to 1987 in Mental Health Status and Help-Seeking Among African-Americans*, 25 J. GERIATRIC PSYCHIATRY 15, 65 (1992).

92. See JOHN MIROWSKY & CATHERINE E. ROSS, SOCIAL CAUSES OF PSYCHOLOGICAL DISTRESS 95 (1989).

93. See KARASEK & THEORELL, *supra* note 62, at 71-72.

94. See GRIER & COBBS, *supra* note 59; Hortensia Amaro et al., *Family and Work Predictors of Psychological Well-Being Among Hispanic Women Professionals*, 11 PSYCHOL. WOMEN Q. 505 (1987); V. Nelly Salgado de Snyder, *Factors Associated with Acculturative Stress and Depressive Symptomatology Among Married Mexican Immigrant Women*, 11 PSYCHOL. WOMEN Q. 475 (1987); Gutierrez et al., *supra* note 4, at 119-20.

95. David R. Williams & An-Me Chung, *Racism and Health*, in HEALTH IN BLACK AMERICA (R. Gibson & J. Jackson eds., forthcoming 2001).

stress.⁹⁶ Additionally, this isolated status may draw an inordinate amount of attention to the minority group member's job performance, and may cause a stigmatizing "token" status to be ascribed.⁹⁷ Thus, African Americans in predominantly white work settings may feel pressure to prove that they were not hired strictly because of affirmative action, as may often be the assumption of their white colleagues. This pressure, coupled with experiences with exclusion and other discrimination, may lead to stress for African Americans as well as other Americans of color.⁹⁸

Although some research has been done on the mental health of African Americans, the findings have been contradictory.⁹⁹ Some studies point to the resilience and coping skills of African Americans and conclude that African Americans have much lower rates of mental illness than do whites. Other studies find that African American rates of mental illness are higher than those of whites.¹⁰⁰ Still other studies have found that rates of mental illness for people of various racial-ethnic backgrounds are moderated by demographic characteristics such as marital and socioeconomic status.¹⁰¹ These contradictory findings have led some to suggest that public health researchers abandon racial comparison research altogether.¹⁰² Others have called for qualitative research, such as ethnographic research and case studies, as well as longitudinal studies that cover

96. *See id.*

97. *See id.*

98. *See id.*; *see also* James et al., *supra* note 67, at 259.

99. *See, e.g.*, George W. Comstock & Knud J. Helsing, *Symptoms of Depression in Two Communities*, 6 PSYCHOL. MED. 551, 556-59 (1976); Ronald C. Kessler & Harold W. Neighbors, *A New Perspective on the Relationships Among Race, Social Class, and Psychological Distress*, 27 J. HEALTH & SOC. BEHAV. 107 (1986) (finding that there are racial differences in psychological problems and that these interact with socioeconomic status); Shae Graham Kosch et al., *Patient Ethnicity and Diagnosis of Emotional Disorders in Women*, 30 FAM. MED. 215, 218-19 (1998) (discussing the contradictions in findings of mental illness in persons of various ethnicities); David R. Williams & Toni Rucker, *Socioeconomic Status and the Health of Racial Minority Populations*, in HANDBOOK OF DIVERSITY ISSUES IN HEALTH PSYCHOLOGY 407 (Pamela M. Kato & Traci Mann eds., 1996).

100. *See* Griffith & Baker, *supra* note 58, at 159 (discussing research that negates the myth that African Americans do not get depressed).

101. *See, e.g.*, Deborah Belle, *Poverty and Women's Health*, 45 AM. PSYCHOL. 385, 385 (1990); Maisha B. Bennett, *Afro-American Women, Poverty and Mental Health: A Social Essay*, 12 WOMEN & HEALTH 213, 223-25 (1987); Comstock & Helsing, *supra* note 100, at 551-52; Horacio Fabrega et al., *Black-White Differences in Psychopathology in an Urban Psychiatric Population*, 29 COMPREHENSIVE PSYCHIATRY 285, 286 (1988); Kessler & Neighbors, *supra* note 99, at 107.

102. *See, e.g.*, Raj Bhopal & Liam Donaldson, *White, European, Western, Caucasian, or What? Inappropriate Labeling in Research on Race, Ethnicity, and Health*, 88 AM. J. PUB. HEALTH 1303, 1303 (1998); Mindy T. Fullilove, Comment, *Abandoning "Race" as a Variable in Public Health Research—An Idea Whose Time Has Come*, 88 AM. J. PUB. HEALTH 1297, 1298 (1998).

more time, in order to supplement contradictory research findings.¹⁰³ Still others have suggested that various societal stereotypes regarding African Americans lead to bias in mental health diagnoses, making any findings regarding the mental health of African Americans dubious.¹⁰⁴ Contradictions in quantitative research regarding the mental health of people of color suggest that researchers should consider that perceptions of people of color may play a primary role in the diagnosis and treatment of those who are psychologically troubled.

Historically, the mental health treatment of African Americans has been conducted on a foundation of stereotypical ideas about African Americans.¹⁰⁵ In the 1800s, some enslaved African Americans who either disobeyed their masters or ran away were given specific diagnoses of mental illness.¹⁰⁶ During Reconstruction, mental health practitioners asserted that the supposed increase in mental illness of African Americans was due to the loss of the many civilizing "benefits" of slavery.¹⁰⁷ In the early 1900s, African Americans were often characterized by whites as promiscuous, emotionally and criminally volatile, childlike, and unintelligent. Psychiatric research generally relied on these racist stereotypes in diagnosis, and researchers even congratulated themselves on the "fortunate guidance" of members of society through whom many African Americans have been "saved" from physically and mentally ruining their lives.¹⁰⁸ Some mental health studies written between the late 1800s and the mid 1900s even stated that African Americans lacked the psychological complexity to become depressed, given their "inferior" psyches.¹⁰⁹ By the early 1960s, new research was beginning to turn to cultural, rather than biological, explanations for racial differences in mental health, and suggested that the more integrated African Americans became, the more they would experience depression, often designated as "the white man's malady."¹¹⁰

103. See Fullilove, *supra* note 102, at 1298; Gibbs & Fuery, *supra* note 89, at 566; David R. Williams et al., *Marital Status and Psychiatric Disorders Among Blacks and Whites*, 33 J. HEALTH & SOC. BEHAV. 140, 155 (1992).

104. See Gibbs & Fuery, *supra* note 89, at 562-63; Kosch et al., *supra* note 99, at 218-19.

105. See generally SANDER L. GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS* 131-49 (1985) (discussing historical stereotypes of pathological madness of African Americans and other people of color).

106. One example is the term "drapetomania" used to describe "runaway-ness." See Thomas S. Szasz, *The Sane Slave: An Historical Note on the Use of Medical Diagnosis as Justificatory Rhetoric*, in *THE PRODUCTION OF REALITY: ESSAYS AND READINGS IN SOCIAL PSYCHOLOGY* 426, 427 (Peter Kollock & Jodi O'Brien eds., 1994); Wilkinson & Spurlock, *supra* note 89, at 15; Donald H. Williams, *The Epidemiology of Mental Illness in Afro-Americans*, 37 HOSP. & COMMUNITY PSYCHIATRY 42, 42 (1986).

107. See Griffith & Baker, *supra* note 58, at 154.

108. See generally W.M. Bevis, *Psychological Traits of the Southern Negro with Observations as to Some of His Psychoses*, 1 AM. J. PSYCHIATRY 69, 69-70 (1921).

109. See Victor R. Adebimpe, *Overview: White Norms and Psychiatric Diagnosis of Black Patients*, 138 AM. J. PSYCHIATRY 279, 281 (1981).

110. See Arthur J. Prange, Jr. & M.M. Vitols, *Cultural Aspects of the Relatively Low Incidence*

Some current research suggests that African Americans are often misdiagnosed by mental health professionals. Diagnostic tests may be racially biased, elevating the observed rates of certain types of mental illness for African Americans.¹¹¹ Researchers have found that even when African American and white individuals present the same symptoms to doctors they are sometimes diagnosed with very different illnesses.¹¹² For example, with the same symptoms, whites are often diagnosed with depression, which is treated with psychotherapy and has a good prognosis, while African Americans tend to be diagnosed as having schizophrenia, which is more serious and must be treated with medication.¹¹³ A study of 100 white and 100 African American women, matched by age, who had visited an outpatient family practice center from 1993 to 1994, explored the rate of primary or secondary diagnoses of emotional disorder for the two groups.¹¹⁴ The research findings showed that forty-four percent of the white women, compared to twenty-four percent of the African American women, had either a primary or secondary diagnosis of psychiatric disorder.¹¹⁵ The researchers suggested that this racial discrepancy was based on evidence that black women actually have less psychiatric disorder, perhaps due to either better family and community support network or a greater reluctance to discuss personal problems with physicians.¹¹⁶

A white standard of normality is usually taught to and used by white therapists. However, cultural norms for what constitutes "normal" or "abnormal" behavior may be different for African Americans than for whites.¹¹⁷ Specifically, African Americans may have different ways of expressing symptoms and complaints, different culturally normative behaviors, and different coping mechanisms than do whites.¹¹⁸ Recent research has suggested that as therapists become more aware of mental health issues unique to people of color, they may need to retrospectively diagnose African American patients to correct earlier

of Depression in Southern Negroes, 8 INT'L J. SOC. PSYCHIATRY 104, 105 (1962).

111. See, e.g., Costello, *supra* note 58, at 518; Gibbs & Fuery, *supra* note 89; Watts-Jones, *supra* note 85, at 274-75.

112. See generally Gibbs & Fuery, *supra* note 89 (discussing the various problems with mental health diagnosis of African Americans).

113. See *id.* at 571; Griffith & Baker, *supra* note 58, at 151, 153; Nancy F. Russo & Esteban L. Olmedo, *Women's Utilization of Outpatient Psychiatric Services: Some Emerging Priorities for Rehabilitation Psychologists*, 28 REHABILITATION PSYCHOL. 141 (1983); Wilkinson & Spurlock, *supra* note 90, at 16-18.

114. See Kosch et al., *supra* note 100, at 216.

115. See *id.* at 217.

116. See *id.* at 218.

117. See GEORGE DEVEREUX, BASIC PROBLEMS OF ETHNOPSYCHIATRY 3-71 (1980); Adebimpe, *supra* note 110, at 282-83; Harold W. Neighbors et al., *The Influence of Racial Factors on Psychiatric Diagnosis: A Review and Suggestions for Research*, 25 COMMUNITY MENTAL HEALTH J. 301, 301-02 (1989).

118. See Fabrega et al., *supra* note 102, at 286; Gibbs & Fuery, *supra* note 90, at 568-72.

misdiagnoses.¹¹⁹

White therapists may harbor negative views of African American patients, based on societal myths.¹²⁰ They may communicate these feelings in their nonverbal behavior, causing African American patients to withhold the kind of self-disclosure that is necessary for psychotherapy.¹²¹ Researchers have found that for African Americans, psychotherapy with a white caregiver often leads to "unhealthful consequences."¹²² Many call for better cross-cultural training for psychiatrists and psychotherapists.¹²³

Because of racial bias in the mental health care profession, African Americans have generally relied on other forms of help for psychological difficulties. Research has been done on the differences in help-seeking behaviors of whites and African Americans.¹²⁴ Early bias in mental health care led African

119. See Griffith & Baker, *supra* note 58, at 151-53.

120. See Elaine J. Copeland, *Oppressed Conditions and the Mental-Health Needs of Low-Income Black Women: Barriers to Services, Strategies for Change*, 1 *WOMEN & THERAPY* 13, 26 (1982); Gibbs & Fuery, *supra* note 89, at 569; Griffith & Baker, *supra* note 58, at 153-54; Wilkinson & Spurlock, *supra* note 89.

121. See Griffith & Baker, *supra* note 58, at 166; Ridley, *supra* note 57.

122. See Stanley Sue, *Psychotherapeutic Services for Ethnic Minorities: Two Decades of Research Findings*, 43 *AM. PSYCHOLOGIST* 301, 302 (1988); Ridley, *supra* note 57.

123. See MANUEL RAMIREZ III, *PSYCHOTHERAPY & COUNSELING WITH MINORITIES: A COGNITIVE APPROACH TO INDIVIDUAL AND CULTURAL DIFFERENCES* (1991); Evalina W. Bestman, *Intervention Techniques in the Black Community*, in *CROSS-CULTURAL TRAINING FOR MENTAL HEALTH PROFESSIONALS* 213 (Harriet P. Lefley & Paul B. Pedersen eds., 1986) [hereinafter *CROSS-CULTURAL TRAINING*]; Robert L. Bragg, *Discussion: Cultural Aspects of Mental Health Care for Black Americans*, in *CROSS-CULTURAL PSYCHOLOGY* 179 (Albert Gaw ed., 1982); Lawrence E. Gary, *Attitudes of Black Adults Toward Community Mental Health Centers*, 38 *HOSP. & COMMUNITY PSYCHIATRY* 1100, 1105 (1987); Jewelle Taylor Gibbs, *Can We Continue to Be Color-Blind and Class-Bound?*, 13 *COUNSELING PSYCHOLOGIST* 426 (1985); Gibbs & Fuery, *supra* note 89; Gerald G. Jackson, *Conceptualizing Afrocentric and Eurocentric Mental Health Training*, in *CROSS-CULTURAL TRAINING*, *supra*, at 131; Gerald G. Jackson, *Cross-Cultural Counseling with Afro-Americans*, in *HANDBOOK OF CROSS-CULTURAL COUNSELING AND THERAPY* 231 (Paul Pedersen ed., 1985) [hereinafter *HANDBOOK*]; James S. Jackson, *The Mental Health Service and Training Needs of African Americans*, in *ETHNIC MINORITY PERSPECTIVES ON CLINICAL TRAINING AND SERVICES IN PSYCHOLOGY* 33 (Hector F. Myers et al. eds., 1991); Enrico E. Jones, *Psychotherapy and Counseling with Black Clients*, in *HANDBOOK*, *supra*, at 173; Harold W. Neighbors, *Improving the Mental Health of Black Americans: Lessons from the Community Health Movement*, in *HEALTH POLICIES AND BLACK AMERICANS* 348, 380 (David P. Willis ed., 1989); Ridley, *supra* note 58; Richard I. Shader, *Discussion: Cultural Aspects of Mental Health Care for Black Americans: Cultural Aspects of Psychiatric Training*, in *CROSS-CULTURAL PSYCHOL.* 187 (Albert Gaw ed., 1982); Jeanne Spurlock, *Black Americans*, in *CROSS-CULTURAL PSYCHOL.*, *supra*, at 163.

124. See generally Gibbs & Fuery, *supra* note 89, at 570-72; Donald R. Atkinson, *A Meta-Review of Research on Cross-Cultural Counseling and Psychotherapy*, 13 *J. MULTICULTURAL COUNSELING & DEVELOPMENT* 138 (1985); Ruth L. Greene et al., *Mental Health and Help-Seeking*

Americans to care for their mentally ill family members at home.¹²⁵ Today, older African Americans in need of psychological support are often more likely to seek help from family and extended family members than from mental health professionals.¹²⁶ Findings also suggest that African Americans are likely to see both physical and mental health as dependent on a healthy spiritual life.¹²⁷ Thus, they often rely on prayer, ministers, and church services for psychological help.¹²⁸ Some have noted that African American church services are similar to group therapy in offering psychological relief.¹²⁹ This might account for the fact that group therapy seems to be more useful than individual psychotherapy, at least for African American women.¹³⁰

Whatever the actual differences in African American and white mental illness and treatment, one observation made by many researchers is that given the amount of societal stress in the lives of African Americans, one would expect them to exhibit much higher rates of mental illness than they do.¹³¹ Some suggest that due to their life circumstances, African Americans may be more tolerant in coping with symptoms of stress.¹³² Thus, researchers have been urged to explore the resilience and coping skills that African Americans utilize to protect their

Behavior, in *AGING IN BLACK AMERICA* 185 (James S. Jackson et al. eds., 1993); Griffith & Baker, *supra* note 58, at 164-65; Vickie M. Mays, et al., *Mental Health Symptoms and Service Utilization Patterns of Help-Seeking Among African American Women*, in *MENTAL HEALTH IN BLACK AMERICA* 161 (Harold W. Neighbors & James S. Jackson eds., 1996); Harold W. Neighbors et al., *Help-Seeking Behavior and Unmet Need*, in *ANXIETY DISORDERS IN AFRICAN AMERICANS* 26 (Steven Friedman ed., 1994); Harold W. Neighbors & James S. Jackson, *The Use of Informal and Formal Help: Four Patterns of Illness Behavior in the Black Community*, 12 *AM. J. COMMUNITY PSYCHOL.* 629 (1984); Wilkinson & Spurlock, *supra* note 89.

125. See Griffith & Baker, *supra* note 58, at 154.

126. See William W. Dressler, *Extended Family Relationships, Social Support, and Mental Health in a Southern Black Community*, 26 *J. HEALTH & SOC. BEHAV.* 39, 40 (1985); Griffith & Baker, *supra* note 58, at 164-65; Robert Joseph Taylor et al., *Changes over Time in Support Network Involvement Among Black Americans*, in *FAMILY LIFE IN BLACK AMERICA* 293-316 (Robert Joseph Taylor et al. eds., 1997);

127. See Karen L. Edwards, *Exploratory Study of Black Psychological Health*, 26 *J. RELIGION & HEALTH* 73 (1987); Griffith & Baker, *supra* note 58, at 156.

128. See Harold W. Neighbors et al., *Stress, Coping, and Black Mental Health: Preliminary Findings from a National Study*, 2 *PREVENTION IN HUMAN SERVICES* 5, 24 (1983); Gibbs & Fuery, *supra* note 89, at 571; Griffith & Baker, *supra* note 58, at 156.

129. See Ezra E. Griffith et al., *An Analysis of the Therapeutic Elements in a Black Church Service*, 35 *HOSP. & COMMUNITY PSYCHIATRY* 464, 464-65 (1984).

130. See Nancy Boyd-Franklin, *Group Therapy for Black Women: A Therapeutic Support Model*, 57 *AM. J. ORTHOPSYCHIATRY* 394, 394-95 (1987); Vickie M. Mays, *Black Women and Stress: Utilization of Self-Help Groups for Stress Reduction*, 4 *WOMEN & THERAPY* 67 (1985-86).

131. See generally Harold W. Neighbors, *Mental Health*, in *LIFE IN BLACK AMERICA* 221, 221 (James S. Jackson ed., 1991); Williams et al., *supra* note 89, at 104.

132. See Linda K. Sussman et al., *Treatment-Seeking for Depression by Black and White Americans*, 24 *SOC. SCI. & MED.* 187, 195 (1987).

mental health from racist attacks.¹³³ To this end, a few researchers have suggested using a stress/adaptation paradigm in mental health research, which emphasizes environmental as well as personality factors in seeking the cause for African Americans' emotional problems and focuses on their unique coping skills.¹³⁴ Some have also stressed the need for life-course research, which would offer a perspective on the strengths and structural barriers in mental and physical health care for African Americans at all stages of life.¹³⁵

Our focus group participants reported various psychological complaints they believed to be the result of workplace discrimination, ranging from extreme anxiety and added stress to depression severe enough to require medication or hospitalization. An administrative assistant was hospitalized for depression after she was almost laid off:

I had been in . . . my department for eleven years when I, we had a major change in staff. We had gone from a white male boss who had just left, and a white female who had taken over in the position. I had seniority in the office as far as time and had just received a promotion in the job, and had nothing but excellent, excellent performance evaluations. But when it came time to do the budget cuts, my position was offered as being ten percent cut. I was told that there was no way to avoid this position being cut. Being that at this time I was the only minority that was, that was in the office, it was devastating to me at the time because we tried to work it out. Now I'm working for an agency that advertises . . . strong affirmative action and equal employment opportunities. So I had a right to file [a] discrimination [complaint].

She then described the resolution, which involved a black elected official interceding for her:

Because I was looking at a layoff. . . . [He] basically went in and told this supervisor that, "With all these vacant positions that we have in this county, you *will* find her a job." I was told on a Friday by the department they wanted to transfer me to, that I had to make a decisions over the weekend and let them know by that following Monday whether I was going to accept this job, which was a [big] cut in pay . . . or go in the unemployment line. I had to help take care of two children, so I chose to go for the transfer. But . . . through all this, and, the mental anguish

133. See Gibbs & Fuery, *supra* note 89, at 574-75.

134. See generally Griffith & Baker, *supra* note 58; Neighbors, *supra* note 131; Watts-Jones, *supra* note 85.

135. See Linda M. Chatters & James S. Jackson, *Quality of Life and Subjective Well-Being Among Black Americans*, in BLACK ADULT DEVELOPMENT AND AGING 191, 208-09 (Reginald L. Jones ed., 1989); James S. Jackson & Sherrill L. Sellers, *Psychological, Social, and Cultural Perspectives on Minority Health in Adolescence: A Life-Course Framework*, in HEALTH-PROMOTING AND HEALTH COMPROMISING BEHAVIORS AMONG MINORITY ADOLESCENTS 29, 40-41 (Dawn K. Wilson et al. eds., 1997).

that I went through, I was hospitalized for nine days. It was just devastating, because I saw it as blatant discrimination. . . . There was nothing they could go to in the file and find in terms of not performing or anything like that. And then the amount of time, get basically kicked out the door is what happened. . . . But then, but not only the financial burden, but just the toll that it took. . . . I think the toll was so hurtful because I saw it strictly as racial.

It appears that much racially linked mistreatment in work settings is disguised by the perpetrators in bureaucratic terms, as here in a budget cut. This woman's judgment of discrimination is not arbitrary but comes from past experience as the "only minority" in an almost exclusively white department. Her ability to read the situation may also be grounded in past experience in a variety of settings. In such cases significant achievements are ignored and serious mental and physical pain can result.

A teacher described a situation in which her boss moved her to a different position just before school started. This woman discovered later that she was moved in order to make room for a new and less experienced white teacher. She described the stress she underwent as a result of having to change so quickly:

I was so upset I didn't know what to do. Just totally wiped out. I'm thinking about all of this stuff I've got to move. She promised that the janitors would help me move. Nobody helped me. People were almost in tears watching me move all of this stuff in a shopping cart. . . . And, it took me, that means I had to organize my stuff, move it, and get ready for another grade level and be ready to teach. . . . So I did my pre-planning; it almost killed me. . . . Nobody came to help me, but everybody was giving me sympathy. I had to go to the doctor. . . . and I had become hypertensive. But I felt myself, I could hardly work, I was so upset. And I had gotten prayer, and, was reading my scripture, and meditating

When the moderator asked her if she had been hospitalized for hypertension, the woman answered:

No, he put me on an antidepressant . . . in addition to the medication I needed to take—I'm glad you made me clarify that, helped me to clarify it, brother. I had to go on an antidepressant. I didn't take it very long, but that's how upset I was, had to see a physician. I was under his care for awhile. But, I mean, they brought these three white women on. . . . That's what irks me, when I hear about the white people attacking affirmative action, when it's worked in reverse, and it's still happening—to them. They're, nobody hears about how they get hired, and they're less qualified than we are. Nobody hears about how many times we're hired with *extra* qualifications, *more* than qualified, to do the same job that they're hired to do.

Thinking along similar lines, an engineer spoke of a black coworker's experience of depression. His view, shared by other respondents, is that African Americans

are reluctant to seek assistance with psychological pain:

But it's kind of more, against black culture to go for any type of psychological . . . testing, or, I had one friend who actually went to a depressive state . . . because he was the type of person who just tried to do the best he could at everything. And sometimes you just can't do that, or do everything. So in this particular case, he went to the point where his body just collapsed, mentally. Where some people's bodies can collapse physically, his collapsed mentally. I personally didn't experience that, but I saw the pain that he went through. And likewise he's having racial type things at his job, where his counterparts would get promoted at a certain level, where he would stay on a level below, after years. And he was as qualified—sometimes they get you in a position to think that you're not as qualified as the next person, where in reality you may be more qualified than the person that got promoted over you. But a promotion doesn't necessarily mean that this person does higher quality work. It means, sometimes that person knows how to network with the boss better than you do.

Again the suffering of one black person is communicated to and felt by others in a social network. Research shows that most African Americans rely on informal social networks for emotional support, thus the concerns of one individual are often known in great detail by a larger support network.¹³⁶ After this comment, a woman in this man's group added that black employees have less time to network with the boss because they are working extra to prove themselves as capable. The engineer agreed with her statement, then continued:

And if you're working, you can't network with the boss, and drink coffee with him, and tell him what kind of work and stuff that you're doing. Because you're actually out there in the trenches going to work. So it was not my personal case, but his particular case, he might have gone to a stage where he had such depression he had to actually take medication.

This idea about black qualifications is a theme that one finds in other accounts by African Americans of discrimination in the workplace, yet it receives little public or media attention.¹³⁷ From the black middle class perspective, it is often the less qualified whites who get special privileges over better qualified people of color. This recurring white advantage can create much psychological pain, including depression, for its black victims. Of additional importance is the networking theme suggested in previous comments. In the United States economy many racial barriers are linked, directly or indirectly, to white "good-ole-boy" networks, which are commonly at the core of workplaces and even of large business sectors.¹³⁸ In these networks whites commonly exclude outsiders

136. See Dressler, *supra* note 126, at 40; Taylor et al., *supra* note 126, at 293-316.

137. See generally ESSED, *supra* note 5, at 145-256; FEAGIN & SIKES, *supra* note 5, at 135-86.

138. Carmenza Gallo, *The Construction Industry in New York City: Immigrant and Black Entrepreneurs* (1983) (unpublished working manuscript, on file with authors).

from critical information flows.

VI. ENERGY LOSS FROM DISCRIMINATION

Another major cost of being mistreated in a hostile workplace is a serious loss of personal energy, including the loss of motivation to do work and other activities. In one national research study an experienced black psychologist commented eloquently about the energy loss suffered by African Americans:

If you can think of the mind as having 100 ergs of energy, and the average man uses 50 percent of his energy dealing with the everyday problems of the world . . . then he has 50 percent more to do creative kinds of things that he wants to do. Now that's a white person. Now a black person also has 100 ergs; he uses 50 percent the same way a white man does, dealing with what the white man has [to deal with], so he has 50 percent left. But he uses 25 percent fighting being black, [with] all the problems being black and what it means.¹³⁹

The individual cost of dealing with discrimination is great, and one cannot accomplish as much when personal energy is wasted on discrimination. One of the most severe costs of persisting discrimination, this energy loss is often more than an individual matter. An engineer made this clear in a group that was discussing the "eight whole hours of discrimination" they daily experience:

One of the things, though, that really has had an effect on my family personally was, me having [less] time to really spend with my son. As far as reading him stories, talking, working with him, with his writing, and, all of that. And those things really, really hurt us, and it hurt my child, I think, in the long run, because he never had that really. . . . I know when, when the program was really, really running, some, some days I would come home and I would have such excruciating headaches and chest pains that I would just lay on the bed and put a cold compress on my head and just relax. Thank God I got him through that period. . . . And by the time I come home, I'm so stressed out. And he runs up to me, and you know I give him a hug, but when you're so stressed out, you need just a little period of time, maybe an hour or so, just to unwind, just to relax, you know . . . to just watch the news or something, to kinda unwind and everything. So it definitely affects . . . and you know you're almost energy-less. . . . And then by the time you get home, you have your family. So, by the time you kinda unwind a little bit to get ready to go to upstairs, you haven't handled responsibilities. . . .

The pain of workplace mistreatment can have a domino effect, with chest pains and headaches being linked to a loss of energy, and that in turn resulting in far less energy to deal with important family matters. The drain on personal strength caused by discrimination takes a toll on the activities of workers in their lives

139. FEAGIN & SIKES, *supra* note 5, at 295-96.

outside the workplace.

In one discussion group a government employee examined the personal energy exertion issue in another of its troubling aspects:

One thing, too, is especially if you spend time documenting situations, that takes time: What was said, what did he say, what did I say, and what did I do? It's not keeping, that's time, too, I mean you're doing that because you never know what's gonna jump out. [Moderator: Why do you feel it necessary to do that?] History. I mean, there were just certain things that, that teaches you that you need to have some information because that's really the only thing they [whites] understand. . . . Documents. When you start pulling out "This is mine, this is what was said, here, here, here," they understand that. [But if] you start talking off the top of your head . . . you have no credibility, you know what I'm saying? With us it always comes down to being above them. This is just like when we were talking about qualifications, you know, they can come in with less qualifications, but we always have to be maxed out. . . . And sometimes go beyond that.

A psychologist in the group once again put this into a long term perspective: "That would seem like, that's always been a factor, always has been a history of us having to prove ourselves, over and over again, with documentation, this and that, and I would like to see [it], get to the point where *my* kids don't have to do that." The energy drain extends beyond the extra effort necessary to prove oneself to whites with prejudiced minds, for it often entails keeping documentation in order to prove one's accomplishments and to counter discrimination in employment. We see again the importance of recording history and of creating a family and community memory, as these respondents constantly orient themselves to what African Americans have had to do collectively in the past and in the present.

To be good at what one does, a black worker usually must learn many things about coping with whites, energy-wasting learning that is not a requisite task for similarly-situated white Americans. In another context, a female planner explained that "Just like we have to, we have to consistently, we have to keep learning things, you know, they need to do the same, they need to jump through the same hoops we have to jump through." In addition, the education of whites seems to be an imposed responsibility of many black victims of discrimination. A sheriff's deputy responded to the previous speaker's statement with this summary:

And that's the same thing . . . we were talking about on the energy. Burning so much energy trying to educate these people, that we qualify, you know? And I always said if you see a black doctor and a white doctor standing side by side, equal in status, that black man is *twice* as better, because he had to work harder . . . in every profession.

This is a point one often hears in interviews with African Americans.¹⁴⁰ The great achievements of many African Americans have come in spite of, and on top of, the energy-sapping barriers of discrimination.

VII. PHYSICAL CONSEQUENCES OF DISCRIMINATION

As seen by all our respondents, blocked opportunities and discrimination not only generate psychological pain and suffering, but also link to many different bodily conditions such as chest pains, stomach problems, headaches, and insomnia. Other research supports this observation.¹⁴¹ The economic status of African Americans has stagnated and even declined in regard to some indicators in recent years, and this decline in economic well-being is associated with worsening health status for African Americans.¹⁴² Some research has shown that the realization that negative treatment in the workplace is based on one's race or ethnicity causes more extreme stress than usual workplace problems that are not based on racial discrimination.¹⁴³ Other research has found that not only are physical health problems associated with workplace discrimination but other health problems are also experienced by persons of under-represented groups.¹⁴⁴

The overall life expectancy of African Americans is lower than that of whites, and this gap increased between 1980 and 1991.¹⁴⁵ African American infant mortality is twice the rate of that of whites.¹⁴⁶ For African Americans under seventy years of age, fifty percent of excess deaths of males and sixty-three percent of female excess deaths can be accounted for by cardiovascular disease, cancers, and problems resulting in infant mortality.¹⁴⁷ Despite popular conceptions, only nineteen percent of excess male deaths and six percent of female excess deaths can be accounted for by homicide. Additionally, excess deaths related to genetic problems make up a tiny percentage. For example, excess deaths from sickle cell anemia make up only three-tenths of one percent of all African American excess deaths.¹⁴⁸ African Americans are disproportionately represented among people with coronary heart disease, myocardial infarction, strokes, and renal disease, and are more likely to have risk factors such as hypertension, high cholesterol, smoking, and diabetes.¹⁴⁹ African

140. See, e.g., BENJAMIN, *supra* note 5; ESSED, *supra* note 5; FEAGIN & SIKES, *supra* note 5.

141. See Mirowsky & Ross, *supra* note 62, at 21-40; see also Keith James, *Social Identity, Work Stress and Minority Workers' Health*, in *JOB STRESS IN A CHANGING WORKFORCE* 127-45 (Gwendolyn P. Keita & Joseph J. Hurrell, Jr. eds., 1994).

142. See David R. Williams & Chiquita Collins, *U.S. Socioeconomic and Racial Differences in Health: Patterns and Explanations*, 21 ANN. REV. SOC. 349, 351 (1995).

143. See James, *supra* note 141 (for a summary of this research).

144. See *id.* at 131-33.

145. See Williams & Collins, *supra* note 142, at 360.

146. See *id.* at 359.

147. See *id.* at 361.

148. See *id.* at 370.

149. See Linda Chatters, *Physical Health*, in *LIFE IN BLACK AMERICA* 199 (James S. Jackson

Americans, regardless of socio-economic status, also have the highest age-adjusted rates of cancer incidence and mortality of any racial group in the United States.¹⁵⁰ Not only do African Americans have higher rates of several illnesses, they also have poorer outcomes and survival rates for most illnesses, evidence that the health care they receive may not be adequate. For example, the cancer survival rate for African Americans is twelve percent lower than that of whites.¹⁵¹ In addition to the discrimination that increases the health problems of African Americans, racism in the health care system may cause African Americans to receive less adequate care than do whites.¹⁵²

African Americans tend to report more health complaints than do persons of other racial or ethnic groups. In a national study of two thousand African Americans, when asked if they have had any health complaints in the last month, only thirty-five percent of African Americans said that they had no health problems at all. The most common health complaints reported were high blood pressure (31.6%), arthritis (24%), and "nervous conditions" (21.9%).¹⁵³ Twenty percent of the African Americans studied had never gone to see a doctor in an independent office setting, and twenty-one percent were uninsured.¹⁵⁴ However, as in the case of psychological complaints, most (sixty-eight percent) of the respondents said that they have three or more people from whom they can seek informal health care.¹⁵⁵

As in the case of psychological health disparities, racial disparities in physical health can also not be totally accounted for by racial differences in socioeconomic status. In fact, some studies have found higher mortality rates for African Americans with higher socioeconomic status than whites with the same status.¹⁵⁶ Neither can racial disparities in health be accounted for by oft-repeated notions of "genetics." In her research, Dr. Camara Jones, a Harvard epidemiologist, has found that African Americans have the *most* genetic diversity of any racially defined group. Nor do African Americans as a group have weaker immune systems than whites. In fact, African American transplant patients run the highest risk of complications because their immune systems are so strong that their bodies are more likely to reject donated organs.¹⁵⁷ Moreover, excess hypertension cannot be attributed to genetics. Black blood pressure levels are similar to whites until adulthood, at which time they increase faster with age than those of whites. This suggests strongly that the racial differential is not a matter

ed., 1991).

150. See Chatters, *supra* note 149, at 202; Frank Michel, *Racism Can Be Cancer on the Health System*, HOUS. CHRON., Sept. 21, 1998, at 18.

151. See Chatters, *supra* note 149, at 202; Michel, *supra* note 150.

152. See Michel, *supra* note 150.

153. See Chatters, *supra* note 149, at 206.

154. See *id.* at 206-07.

155. See *id.*

156. See Michel, *supra* note 150.

157. *NPR Weekend* (radio broadcast, Frank Browning moderator, Oct. 31, 1998) (transcript number 98103106-21).

of genetics or lifestyle; it suggests that being a victim of racism has a detrimental effect on blood pressure. In a study of African American and white nurses, Jones found that the majority of African American nurses think about race at least daily, and many of them are constantly aware of their racial classification. This constant awareness contributes to undue stress.¹⁵⁸

Others have highlighted the need to take into account not only African Americans' personal context, but also the larger historical context when looking at racial disparities in health. For example, the civil rights movement seems to have had a positive effect on African American health.¹⁵⁹ Other research has found that African American physical and mental well-being is highest when the discrimination reported by African Americans is lowest.¹⁶⁰ Research suggests that racism can affect African American health in three major ways. First, racism can transform socioeconomic status such that its effects are not equal across race. For example, African Americans cannot expect the same returns on their educational investments, in terms of wages, as those of whites. Second, racism may restrict access of African Americans to health services and to recreational facilities that could benefit their health. Finally, racism causes psychological distress that may create severe health problems for African Americans.¹⁶¹

Our respondents noted the impact of racism on their health. One focus group participant, a dental assistant, made the connection between the discrimination and physical ailments eloquently:

I don't think a lot of [people] realize that, when you're talking about ailments, you're talking about more colds, higher blood pressure, things like that. People don't relate that to your job. Like when you come down with more colds, a lot of times, it's [racial] stress on your job . . . [I was] in another job, and it seemed like the more stress I was under, it would make me feel worse. I would be sick, I would have more colds, I would want to sleep more, and basically it was related to my job, the pressure on my job. But I didn't put it that way, you know, a lot of times I would think if I was under stress, I wouldn't relate it to a cold.

Similarly, a nurse in a southeastern state noted that the bottling up of stress from discrimination leads to a variety of health problems, as well as to excessive smoking and drinking:

But you stuff that stuff inside, and it comes out in these kinds of ways. And we can sit down and talk to each other, and that pain . . . they said that it can cause fibroids in women, that's why black women have a lot of fibroids. Because all of that pain gets stuffed inside. . . . That's why black men . . . die so early. You know, if you take out the factors of drinking, and smoking, and why is it that black men die from heart

158. *See id.*

159. *See Chatters, supra* note 149.

160. *See id.*

161. *See id.* (giving a complete discussion of these three points).

disease or from—it's that stuffing inside of those subtle things that we, that we just, that we can't say anything

From this perspective, it seems discrimination has many consequences, ranging from fibroids to heart disease. To ease their pain stemming from racial harassment, some African Americans smoke and use alcohol excessively. Benjamin suggests that racial barriers are likely to be associated with stress patterns, alcohol abuse and other health problems.¹⁶² Gibbs similarly contends that anger created in black men by racial discrimination is likely to manifest itself in chronic fatigue, depression, anxiety, and psychosomatic complaints such as headaches.¹⁶³

A. Headaches

A number of male and female respondents spoke of severe headaches that they attributed to workplace stress, such as a nurse in the Midwest: "I would have this headache and it would be for eight hours until I walked out the door and then it was like . . . a weight was lifted off." A social services coordinator described headaches and other consequences in a discussion of discriminatory work conditions:

I was having severe headaches and chest pains. . . . It would be times when I would almost be in the office hyperventilating. And . . . it was just a lot of physical things happening to me. I would pull hair more, because, just the stress, you know? You just, you're trying to do so much, and collect your thoughts and do what needs to be done. And my hair had fallen out in the back of, the back of my hair, it just had fallen out! . . . And the headaches were just, just terrible, just unbearable. And it's also a psychological kind of ill, in that, well you know if [white] people are constantly watching you. . . . But it, it's just amazing the psychological ill that it does to you. And even though you know you're competent? People can do that so much to you . . . they can get in meetings and try to show you up and make you look like you just don't know anything. And it is so many of them, you are outnumbered! Sometimes, you come out, and lash out, and you almost validate what they're trying to say about you, because you feel outnumbered! . . . So, you, you begin to doubt yourself, you begin to psychologically feel somewhat incompetent. . . . So, it, it can take a toll on you, and I think it takes more of a psychological toll on us than we even care to admit.

Headaches are only one part of an often complex set of consequences that come from coping with hostile or unsupportive whites in a workplace with few African Americans. Chest pains, hyperventilating, and serious psychological doubts also accompany headaches that stem from whites questioning African Americans'

162. See BENJAMIN, *supra* note 5.

163. See Jewelle Taylor Gibbs, *Anger in Young Black Males: Victims or Victimizers?*, in THE AMERICAN BLACK MALE 136, 127-43 (Richard G. Majors & Jacob U. Gordon eds., 1994).

competence and abilities.

B. High Blood Pressure

Recent research reports have indicated that high blood pressure is a serious problem among black Americans.¹⁶⁴ A few studies have shown that stressful life events, such as racial inequalities, are linked to high blood pressure.¹⁶⁵ For African Americans, socioeconomic status has been shown to be associated with blood pressure and hypertension; as socioeconomic status decreases, blood pressure increases. A recent research study of 1784 African Americans found that this relationship may be in part due to poorer nutrition of those with lower socioeconomic status.¹⁶⁶ Yet, racism also has an effect. Research by Krieger and Sidney examined stress and blood pressure in over 2000 African Americans.¹⁶⁷ Those who gave accounts of facing discrimination on three or more of seven situational questions tended to have higher blood pressure than those who reported facing discrimination on one or two questions.¹⁶⁸ In a previous study, Krieger found that black Americans who usually keep quiet about or accept unfair treatment are more likely to report hypertension problems than those who talk to others and take action against unfair treatment.¹⁶⁹ Another study, which controlled for age and weight, found that higher levels of discrimination were positively related to higher blood pressure for African Americans.¹⁷⁰ Still other studies have found that for hypertension, as well as for certain forms of cancer, socioeconomic status alone did not account for differences in illness rates between whites and African Americans.¹⁷¹

Recent research has associated a cultural pattern known as "John Henryism" with higher blood pressure. "John Henryism" refers to the attempts made by African Americans to control their environment through hard work.¹⁷² These attempts amount to long-term, intensive contending with the psychosocial stressors associated with dealing with racism. Sherman James and his colleagues

164. See generally ALPHONSO PINKNEY, *BLACK AMERICANS* (1993).

165. See, e.g., Norman B. Anderson, *Racial Differences in Stress-Induced Cardiovascular Reactivity and Hypertension*, 105 *PSYCHOL. BULL.* 89, 89 (1989); James et al., *supra* note 67.

166. See generally Ann M. Gerber et al., *Socioeconomic Status and Electrolyte Intake in Black Adults: The Pitt County Study*, 81 *AM. J. PUB. HEALTH* 1608 (1991).

167. See generally Nancy Krieger & Stephen Sidney, *Racial Discrimination and Blood Pressure: The CARDIA Study of Young Black and White Adults*, 86 *AM. J. PUB. HEALTH* 1370, 1371 (1996).

168. See *id.* at 1372-73.

169. See Nancy Krieger, *Racial and Gender Discrimination: Risk Factors for High Blood Pressure?*, 30 *SOC. SCI. & MED.* 1273, 1278 (1990).

170. See James, *supra* note 141, at 138.

171. See George Davey Smith et al., *Mortality Differences Between Black and White Men in the USA: Contribution of Income and Other Risk Factors Among Men Screened for the MRFIT*, 351 *LANCET* 934, 936 (1998).

172. See James et al., *supra* note 67, at 260.

have found that African Americans with higher “John Henryism” are more likely to have high blood pressure.¹⁷³ Several focus group participants gave details on how hypertension is linked to racial stress, including that encountered at work. One nurse in the Midwest commented on her reactions as she enters the driveway of the place where she is employed:

That’s when I got high blood pressure. And my doctor . . . I told him what my reaction, my body’s reaction would be when I would go to this place of employment . . . which was a nursing home. When I turned into the driveway I got a major headache. I had this headache eight hours until I walked out that door leaving there. . . . I went to the doctor because the headaches had been so continuously. And he said, “[Her name], you need to find a job because you do not like where you work.” And within myself I knew that was true. But also within myself I knew I had to have a job because I had children to take care of. But going through what I was going through wasn’t really worth it because I was breaking my own self down. . . . It was constant intimidation. Constant racism, but in a subtle way. You know, but enough whereas you were never comfortable. . . . And then I finally ended up on high blood pressure pills because for the longest, I tried to keep low. I tried not to make waves. It didn’t work. I hurt me.

Again the workplace is filled with the headaches and other pains of “constant racism.”

In one focus group, a secretary working in the South believed that being repeatedly passed over for promotions caused her hypertension:

And to me, it hurt me deeply. . . . So I had, you know, I had stood in prayer lines for prayer, to help me ease my mind and everything. To help me say the right thing, or go to the right, appropriate department, to get, you know, get it started. And it was just hard, because I was real hurt, and sometimes I would just down and cry about it. . . . So, well, to make the story short, I had applied for a promotion, and I had applied for this promotion twice. . . . I was tired, I was getting stressed out, and everything, and plus this—so I was in a lot of pain, so I think I built up my blood pressure, really.

Later, this woman required a doctor’s care for her high blood pressure:

I had to see several doctors, because of the discrimination, and I went through a lot of stress. And then, my blood pressure, I had never had high blood pressure, and all of the sudden, it just went on the rise, and I couldn’t control it. And . . . [her supervisor] wanted me to perform the duties, you know, totally by myself, which it took like three, two or three people to do.

This account underscores the levels of pain and the loss of energy involved in

173. See *id.* at 273.

contending with mistreatment seen as racially motivated. Using religion for solace, as well as speaking out, are strategies for the daily struggle. Although this woman noted in the interview that she finally received the help needed at work, the damage to her health had already been done.

As we have noted previously, in the focus groups, the suffering of other African Americans was sometimes cited as a cause of personal stress for the commentator. In one focus group an engineer explained how he empathized with a fellow employee who developed hypertension:

I have a prime example of this, this has actually happened in our job. A particular [black] person in our, in the branch. . . . was being discriminated against. The supervisor knew of it, and—what was happening, all our branch chiefs, they knew of it. And knew that the [white] supervisor was discriminating against this young lady. And, matter of fact, it drove this young lady to where now she's on high blood pressure medicine, and it really affected her. She wasn't getting promoted and all that. And the branch chief knew what was going on. . . . But the thing is, is that this person went through all that, and now the person is on high blood [pressure medicine]—it affected her mentally and physically.

Being hired is only the first hurdle for black employees. For recurring promotion problems are also reported by African American employees in a variety of businesses.¹⁷⁴ Not surprisingly, they create great stress. In late 1996, some unexpected evidence of this problem surfaced on an audiotape made of top Texaco executives discussing a lawsuit brought by black employees, some of whom asserted they had been passed over for promotions because they were black. In the taped meeting the white executives did not take the reports of the black employees about the pain and frustrations of a "hostile racial environment" seriously.¹⁷⁵

C. Stomach Problems and Emotional Distress

According to several of the focus group participants, stress in the workplace creates or contributes significantly to stomach and other intestinal problems. A telephone technician explained the intertwined nature of psychological and physical problems resulting from overt racial animosity:

Well, psychologically, the psychological part and the physical part kind of go hand and hand. . . . And I have never been a sickly type person, and I had never had any problems with my stomach, but I actually did have to go to the doctor, and the doctor said I was having—they ran a test and he diagnosed it as gastrointestinal problems. And . . . depending

174. See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993); ESSED, *supra* note 5.

175. See Kurt Eichenwald, *Texaco Executives, on Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A1.

on the amount of stress work would be in, I would actually have serious attacks, where I would really get, really feverish, high fever, and I would just get real, real sick. And they prescribed Tagamet . . . for me to take, but after taking that a couple of times, it made me really sick, and so, when I would have these gastrointestinal, these attacks, I would just kind of really have to go through it. And a lot of times my job would just be so stressful, because I work for people that . . . they were overt . . . not covert . . . they'd just flat out let you know that they just didn't like black folks I worked with those kind of people. And even though I kind of enjoyed my work, I didn't enjoy those people, because they could make the situation really hard for me. . . . And they would actually try to find . . . something wrong with [your work] . . . and that would just bug me, because, you know, I know that I meticulously try to do it, but even in that they could come right behind me and try to pinpoint little, little small things, and find something wrong with it.

Then she added how she copes in advance: "It was very, very stressful, because every day you're constantly mentally trying to prepare yourself when you get out of the car in the morning and you go in, go into work, you're trying to prepare yourself, 'Well what do I have to face today?'" One factor in the personal cost of discrimination is that which comes from having to be constantly prepared. One strategy used by African Americans to counter mistreatment from whites is to put on a defensive "shield," the term used in a conversation with a retired teacher recorded by Feagin and Sikes.¹⁷⁶ In that account an older black woman contrasted her life with that of a white woman, who, like her, bathes and dresses before leaving the house. Unlike the white woman, however, she must put on her "shield" just before she leaves. She noted that for six decades, she has had to prepare herself in advance for the often unpredictable racist actions in the white worlds she often traverses.

Another woman, a supervisor in the Southeast, reported stomach problems that she believed stemmed from actions of a fellow white employee:

But I was just so frustrated because she was . . . prejudiced, and she let it be known. And even though I confronted her on it, and any time she would say something to me, and I would tell her, I said "Look, if you can't deal with me on a professional level, then don't deal with me at all." And she was the type that, she would just do little things. And that just would annoy me . . . and I never knew it then, and then I was reading a book one day, and it said don't let things bother you, because, you know, physical breakdown. . . . I can't really say it's an ulcer, but I had stomach problems. I'm gonna tell you what, what I did come to find out about her, though, was that sometimes when people are like that . . . she was raised in [names a southern state], this is backwoods. So she was brought up that black people—you know to treat us like that. And I told her, I said, "Well, you can't treat—everybody's not the same, what if I

176. See FEAGIN & SIKES, *supra* note 5, at 295.

treat all white people bad? You know, call you all kind of names and everything like that? That's not fair!" I said, "Because I could miss out on a good friend, or a good person." And it took some convincing, but what I did, I didn't step to her level. Because she would [say] little things—I would never get upset with her, but I always remained myself, because I didn't want her to think that she was getting next to me, because once they figure that out, then they really start to pour it on. . . . But see, sometimes people do you like that, it was a girl at work . . . she called me and another girl . . . a "nigger" one day. And the other girl got mad, was very, was ready to fight.

Physical ailments are only one aspect of such complex situations. Again one sees the energy lost in making and implementing one's decision about interpersonal confrontations over racial matters. This black woman shows much understanding and even forgiveness for a white employee. In a later account, not quoted here, she relates how the woman became sick and how the respondent was the one who accompanied the woman to the hospital and stayed with her. In the end, the white woman eventually told the respondent that "all black people aren't bad." This black woman was able to treat the prejudiced white woman with compassion despite how the white woman had treated her.

VIII. FAMILY AND COMMUNITY COSTS OF DISCRIMINATION

A. Family Costs

As some of the respondents have already noted, the damage of a racially hostile or unsupportive employment situation does not end at the workplace door. An individual's experience with racial animosity and mistreatment at work not only is personally painful at the moment it happens, but also can have a cumulative and negative impact on other individuals, on one's family, and on one's community.

Bringing frustrations home can have negative effects on families and relationships, such as the lack of energy that a father mentioned previously has for doing things with his young son. The harmful effects of bringing discrimination home to one's family was clearly elucidated by one concerned mother, who is a social services administrator:

So many times, after you've experienced an eight whole hours of discrimination, either directly or indirectly, it really doesn't put you in the mood to go home and read that wonderful bedtime story. You're just tired, and you just want to get somewhere, and really, you're crying on the inside, and you may not really want to admit [it] to yourself. Because all us like to think we're in control of what's happening to us. And I think we all deal with it differently. And that anger sometimes builds up, and you're not even aware that it's there, so the moment your spouse, or your child, if there is anything that may seem like it was a belittling or demeaning, you're responding to them with a level of anger, even, that really is inappropriate for the situation. But what you're really

responding to is that eight hours prior to getting home.

She then reiterated how often she had to deal with substantial amounts of stored-up anger:

And I know several times . . . well, a couple of times I totally forgot to pick my child up from school! Because I was so engrossed with trying to make sure that I do this, because if I don't do this, I'm gonna duh-dah, duh-dah, duh-dah. . . . My daughter had gotten to the point during that year when I was under all that stress, till she would tell me four and five times, she would remind me "Mom, I'm having this at school." And then she would get to school, and she would call me—one day she called me to remind me about something, I was supposed to pick her up, or something, and I just sat at my desk, and I just boo-hooed, I said, "My baby doesn't have any confidence in me anymore. . . . I'm really not there." . . . And that, really, that was really the beginning of me saying "Look, nobody's gonna do anything to get this on track for you, you got to get this on track for yourself." And then, sometimes you go home and you've held your peace so long, till the first hour that you walk in the door, you're still dealing with everything. You may even be dealing with it verbally. . . . And then, they have their own issues to deal with that day. And like, they just want to have dinner and relax, you know? So your family, inevitably I'd say, suffers. We bring all of that baggage home, and then we wonder why our relationships are in trouble.

Whether a person recognizes the harmful effects of bringing anger home from work to the extent this woman does, struggles with discrimination can lead to a variety of suffering for others, as in this case for a child who is forgotten at school or for a spouse who wants to relax. Sharing problems with animosity and discrimination can create a domino effect of anguish and anger rippling across an extended group. Another result of using families as a resource to deal with the stress of racism can be troubled relationships. It has often been noted that black women are more likely than white women to become separated or divorced and less likely to remarry.¹⁷⁷ Nonetheless, the direct, negative impact of everyday racism on the difficulties faced by black families has *not* been featured in the mainstream literature on the so-called "broken" and "disorganized" black families.¹⁷⁸

B. The Community Impact

The impact of marginalization at work can carry over into community activities. Black workers' lack of energy affects motivation to socialize outside the home and to participate in community activities. The social services worker

177. See ARTHUR J. NORTON & LOUISA F. MILLER, U.S. DEPARTMENT OF COMMERCE, MARRIAGE, DIVORCE AND REMARRIAGE IN THE 1990'S, 3-5 (1992).

178. See, e.g., OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEPARTMENT OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

who discussed her family above reported that she had withdrawn from activities in her community because of the drain on her energy caused by racial animosity at work. A teacher described having to give up participation in community groups because of lack of energy:

At one point we had started a minority action committee which is still in existence, with the school district. And it's interesting because it's very hard to get people after they've fought all day, in a sense, that have enough energy to come out and support an effort like that where it is needed. We know the racism is out there, we know we need to fight for our kids—that was the main thrust of it when we came together. We could see it happening in the schools everyday, particularly to our black boys. . . . And we endeavored to do something about it, but, as I was saying, we were just so drained, it just never got off, off the ground. [speaking quietly] Hopefully, somebody might

Other participants echoed this sentiment, noting the impact of the energy loss on various community and church activities. Note here that there is both a personal and a community cost. Part of the personal price is not being able to be fully involved, which includes meaningful interaction in community groups and associations.

The spin-off effects of animosity and mistreatment in employment settings can be seen in other areas of the lives of African Americans. One respondent noted the negative impact on participation in church activities:

I have withdrawn from some of the things I was involved with at church that were very important to me, like dealing with the kids at church. Or we had an outreach ministry where we would go out into the low-income housing and we would share about our services, we would—And I was just so drained, like [names person] said, if we are all so drained, and we stop doing that, then we lose our connection. But I, physically, by the time I got home at the end of the day, I was just so tired, I didn't even feel like giving back to my community, I didn't feel like doing anything. And so I withdrew from church activities, to the point where I just really was not contributing anything. And it was pulling all that energy, I was exhausted from dealing with what I had to at work. And then whatever little bit was left, went to my family, so there was nothing there to give.

The overwhelming impact of workplace racism is graphically described, for even church activities become a problem for this person. These economically successful African Americans can be important role models in their local communities, but only if they have the energy to participate actively in churches and other community organizations.

From their discussions of the energy-draining aspects of discrimination, one might wonder how African Americans have developed community organizations and resistance movements over the centuries. Most overcome the everyday racism enough to stay in life's struggles. Interestingly, the post-World War II "medical civil rights movement," which was an effort by African Americans to gain equal access to quality health care, was a precursor to the larger civil rights

movement of the 1960s.¹⁷⁹ Such efforts, as well as the efforts involved for the success of the more general civil rights movement of the 1960s, required that African American activists have good health and the energy necessary to struggle for societal change. While some people drop out entirely, most seem to stay in the struggle most of the time and exert great energy to overcome the barriers. The retired professor who spoke earlier of the “ergs of energy” lost because of discrimination also noted his many accomplishments and the issue of what he might have accomplished without racial barriers.

Accumulating discrimination in predominantly white work settings creates serious difficulties not only for African American employees but also for ongoing group relations in these places. A number of comments by the focus group participants suggest or imply that animosity exhibited by white employees makes normal interaction across the racial line difficult or impossible. Incidents at work disrupt lives by changing the meaning of the most commonplace of everyday interactions. Moreover, there is much unnecessary stress in forming new white contacts when one is suspected of being a discriminator. Several respondents noted that they felt a need to keep a distance from whites at work. Indeed, most seemed to agree with this respondent in his evaluation of coping with white hatred: “I think what helps us as being black now, we understand what these [white] people think. We understand why they have hate. Where before, coming off the boat when we were slaves we didn’t understand it.” Note too that slavery still remains a reference point for African Americans, even though many white Americans see it as a part of a very distant and irrelevant past.

CONCLUSION

Some literature suggests a “declining significance of race,” and an increasing importance of class, in regard to the situation of African Americans nationally.¹⁸⁰ Other more recent research goes further to assert the “end of racism” in U.S. society today.¹⁸¹ Our research flatly contradicts both the assertion that racial discrimination is being replaced by class discrimination, and that racism has been substantially or entirely eradicated. While both class and racial characteristics have been shown to interact and cause health problems for African Americans, our interviews with relatively affluent African Americans demonstrate that *racism alone* is enough to create serious health problems for them.¹⁸² A racialized society exists because discrimination is practiced, rewarded, or ignored within important social settings such as historically white workplaces. Our data and that of other recent studies undertaken by the authors and other scholars indicate that discrimination by white Americans targeting African Americans is still commonplace in a variety of arenas, including government and corporate workplaces.

179. See SMITH, *supra* note 7, at 169.

180. WILSON, *supra* note 38, at ix.

181. See generally D’SOUZA, *supra* note 54, at 525.

182. See Kessler & Neighbors, *supra* note 99, at 108.

Much research on racial relations focuses on the attitudes of those who discriminate rather than on the suffering inflicted on the targets of discrimination. A fleshed-out perspective on discrimination directs us to pay attention to particular social settings and to the consequences of racial discrimination in such settings. Recurring discrimination in workplaces and elsewhere wastes human beings and human capital and seriously restricts and marginalizes its victims, destroying the possibility of completely normal lives.¹⁸³ This discrimination is so dehumanizing that in discussing it some black workers even make reference to the "slave-master mentality" of discriminating whites and to "feeling like a slave" in white workplaces. By marginalizing and dehumanizing black workers, whites cause them and their loved ones much damage, pain, and suffering. According to the accounts of the respondents, the damage takes many forms. The negative impact of racial animosity and discrimination includes a sense of threat at work, lowered self-esteem, rage at mistreatment, depression, the development of defensive tactics, a reduction in desire for normal interaction at work, and other psychological problems.

Our respondents understood that the often high level of racialized stress in workplaces has generated or aggravated their physical health problems. Most recognize the threat discrimination brings to their health, and most try hard to fight it and its consequences. Not surprisingly in the light of the data from the focus groups, a growing public health literature indicates that there are wide disparities in the physical health of white Americans and African Americans, as well as in the application and use of medical services.¹⁸⁴ A full understanding of the physical and psychological suffering of black Americans at the hands of white Americans necessitates a close look at the character and impact of the discriminatory workplaces as they are experienced by workers. Sentient human beings react seriously, in their minds and bodies, to mistreatment and discrimination. The recurring and dehumanizing discrimination creates, among other things, marginalization, impotent despair, and rage over persisting injustice.

Our data show that the costs of racial animosity and discrimination extend beyond the individual to families and communities. Social scientists have written much over the last few decades about problems in black families and communities. This discussion often focuses on the so-called "broken" or "disorganized" black families, with the responsibility for these conditions commonly placed on African Americans for not maintaining their families and communities and for not adhering to certain values.¹⁸⁵ In contrast, more structural and contextualized accounts of these family and community problems fault the U.S. economy for its failure to provide enough job training or jobs.¹⁸⁶ Yet, to our knowledge, nowhere in the social science literature is there a serious discussion of the points made by the focus group participants about the direct and

183. See Marsella, *supra* note 41 (describing how racism in the workplace harms not only African Americans, but also the companies in which they are employed and society at large).

184. See, e.g., *supra* notes 141-55 and accompanying text.

185. See D'SOUZA, *supra* note 55.

186. See WILSON, *supra* note 38.

harsh impact of racial animosity and discrimination on their families, voluntary associations, and communities. The long era of racial discrimination has often reduced the energy available to African Americans to build stronger and better families and communities. While many have managed to build strong families and communities in spite of discrimination, they have done this by exerting super-human efforts that take toll in their personal health or on the ability to maximize contributions to the larger society. These focus group accounts suggest that the total cost of racial animosity and discrimination is *much* higher than most social science, legal, and journalistic commentaries have heretofore recognized.

African Americans remain central to the costly system of racial oppression in the United States, and they have long been among the strongest carriers of the ideals of liberty and social justice. In spite of the weight of racial oppression, most have been creative and successful in their lives and communities, and most have regularly pressed the society in the direction of greater liberty and justice. Indeed, their sense of social justice has perhaps the greatest potential for stimulating further movement by this society in the direction of its egalitarian and democratic ideals. African Americans have developed large-scale social movements twice in U.S. history, and smaller-scale movements many other times. Significantly, most African Americans have not retreated to a debilitating pessimism but have slowly pressed onward. Today, they join religious, civic, and civil rights organizations working to eradicate systemic racism, to get civil rights laws enforced, and to secure better living conditions for Americans of all racial and ethnic backgrounds. There are lessons here for all Americans concerned with eliminating systemic racism in the United States.

Today, the state and federal court systems face many challenges, not the least of which is the fact that the U.S. population is rapidly becoming less white and European and much more Asian, Latino, African, and Native American in its composition. In spite of these changes over the last few decades, however, the overwhelming majority of district attorneys, judges, and court administrators are still white. This means major and increasing problems for the court system. As the mostly white judges look across the bench at growing numbers of defendants of color, their understanding of those they face, and their ability to mete out justice, are likely to be affected by the heritage of white racism that is imbedded not only in the court systems but in all major institutions. These understandings (or lack of understanding) sometimes result in court decisions, such as the *Etter* decision by a California court, that do not view black workers' representations of pain and suffering from recurring racial insults as severe. In that case, racist epithets such as "Buckwheat," "Jemima," and the like were not seen as "sufficiently severe or pervasive" to warrant a judicial remedy. Yet, as we have shown, racist epithets and incidents can be very serious, painful, and damaging to their African American targets. The hurling of even a few racist words can be a very hostile and discriminatory act, and that can in turn generate much pain, especially since even one such act can trigger memories of accumulated experiences with racism by those so targeted.

In the *Etter* case, a white judge called on a jury to assess if the reported antiblack conduct would be considered severe by a "reasonable person of the

Plaintiff's race." However, judging from the data in our focus groups and in studies of whites we have cited, the pain and suffering most African Americans endure because of continuing racism are likely not known to or understood by most whites, be they white jurors or other white Americans. How then can whites presume to answer the judge's critical question?

As we see it, such questions can be most meaningfully and reliably answered when there are larger, or representative, numbers of African Americans in the state and federal court systems. If we are to achieve the dream of a truly just society, we must greatly expand the input into our justice systems by African Americans and other Americans of color – at all levels, from policing, to prosecution, to administration, to courts, and to prisons. It is past time for the U.S. justice system to become much more democratic, multiracial, and multivoiced in its management and everyday operation. And it is past time for the pain, suffering, and anger that African Americans and other Americans of color confront because of widespread discrimination to be truly heard in the justice system.

WORLD TRADE AGREEMENTS: ADVANCING THE INTERESTS OF THE POOREST OF POOR

JOHN O. MCGINNIS*

My concern in this brief essay is with the poorest of the poor, those who now sell charcoal in Madagascar or sell textiles in the Andes. To walk among these people is to witness real poverty and inequality—not the relatively small quantum of poverty and inequality existing within Western society. Whatever the formal measures of poverty, there has been a large convergence in modes of living of people living within developed nations. Even relatively poor citizens have access to what the extremely wealthy had only a hundred years ago. However, when traveling to the developing countries of the world, one sees the kind of raw poverty that blights all opportunity, makes the relatively young seem aged, and the previously healthy appear prematurely infirm.

Free trade is a way to help the world's poor, including those whose poverty is life threatening. Theoretically, free trade opens new markets in areas where developing nations produce efficiently and thus allows the poor to raise their income by selling more exports. It also brings them into the web of exchange, encouraging the skills of entrepreneurship and habits of industry that will lift them from poverty. In turn, the additional skills and income help give the poor an independence from their governments and consequently leverage to push for changes in their own nations that will better their lot.

Empirically, evidence overwhelmingly supports the proposition that trade helps poor countries become more wealthy.¹ One major difference between developing countries that have prospered and those that have not is their participation in world trade.² Moreover, empirical evidence shows that international trade helps those lowest on the income scale of developing nations as much as those higher on the income scale.³

Free trade also helps makes developed nations wealthier even as it provides benefits to the least fortunate. For instance, it provides cheaper goods for United States consumers and new markets for the goods we produce most efficiently. While the evidence is conflicting on whether free trade increases inequality within wealthier countries, government mechanisms, such as progressive taxes and targeted retraining grants, can compensate for losses of the less well-off. This option is far more efficient than simply blocking trade.⁴

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1. See, e.g., L. Alan Winters, *Trade and Poverty, Is There a Connection?*, available at http://www.wto.org/english/news_e/presoo_e/pov3_e.pdf; see also David Dollar & Aart Kraay, *Growth Is Good for the Poor* (Mar. 2000) (unpublished manuscript), available at <http://www.worldbank.org/research/growth/pdfiles/growthgoodforpoor.pdf> (citing a World Bank study that, using data from eighty countries over four decades, confirms that openness to trade boosts economic growth and that the incomes of the poor rise proportionately with overall growth).

2. See Dollar & Kraay, *supra* note 1.

3. See *id.*

4. See Winters, *supra* note 1, at 43 (arguing that nations should seek to alleviate the

Moreover, the advantages of free trade to groups in developed countries are crucial to obtaining open trade for developing countries and thus to helping the poorest of the poor. Protectionist interest groups have substantial leverage in developed democracies and use that leverage to block imports of goods from other countries.⁵ The World Trade Organization, however, provides a framework for reciprocal tariff reductions. Reciprocity gives exporters in developed countries an incentive to lower their tariffs so that they can obtain lower tariffs abroad.⁶ This political structure makes rich exporters the guarantors of the interests of the world's poor in the global economy.

I do not mean to suggest that poor are helped by bread alone. Civil rights are also helpful to the poor. But trade agreements can also facilitate the expansion of civil rights in developing countries not through fiat but through encouraging a process which will generate pressure for such rights internally. Civil rights are highly correlated with wealth of society.⁷ This accords with historical evidence that because of prosperity, a rising middle class demands civil and political rights to help secure its swelling wealth against the dangers of tyrannical government and political instability.⁸

The ability of multilateral trading agreements to cascade into civil rights has one important advantage over the direct international pursuit of human rights: It is more likely to be honored by the despotic countries.⁹ Many countries, particularly developing nations that have signed the Universal Declaration on human rights as well as the most important human rights conventions, nevertheless continue systematically to abuse the civil and political rights of their people and resist basic democracy.¹⁰ In contrast, authoritarian regimes are more likely to honor trade multilateralism because expanding trade increases the nation's wealth and thereby enlarges the tax revenues and other exactions of its leaders. Therefore, by offering attractive bait to hook the leaders of despotic regimes, multilateral trade agreements may provide an effective route to securing civil and political rights. In this way trade agreements are also in the long run advantageous to the poor.¹¹

Unfortunately, groups in developed nations are seeking to limit trade with

hardships caused by trade rather than abandon all attempts at reform). See also Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 212 (2000).

5. See DENNIS C. MUELLER, PUBLIC CHOICE II 238-42 (1989).

6. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 545-46 (describing reciprocity regime).

7. See JAMES GWARTNEY ET AL., ECONOMIC FREEDOM OF THE WORLD, 1975-1995 at xxii (1996) (showing that citizens in wealthier countries enjoy greater protection for civil rights than those in poorer countries).

8. See John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. L. REV. 1029, 1032 (1999).

9. See John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT. L. 381, 392 (2000).

10. *Id.*

11. See *id.*

poorer nations unless the World Trade Organization (WTO), the international agency that now administers global trade agreements, moves toward imposing international imposing labor and environmental standards on the production of exported goods. This stance, taken at the behest of labor unions and other wealthy interest groups in the developed world, represents a dramatic break from the policies pursued by every post-war President from Harry S. Truman to George W. Bush that favored greater free trade without regulatory strings. As leaders of developing nations understand, this new trade regime would retard, perhaps even end, their economic progress. Developing nations cannot afford our labor and environmental standards, just as they cannot afford many other goods that the West takes for granted. Moreover, industries and workers in the developing world lack the resources or lobbyists to defend their interests in the distant international forums in which regulations would be forged.¹² As a result, international rules on labor and the environment would tend to block exports from developing nations, dealing a blow to the prospects of the poor in the developing world.

The WTO's help for the poor has some general implications for ways of using government to aid the poor. Note that a key step in the WTO example is to link the poor's interests to the tangible interests of a wealthier, more influential group, in this case the exporters within developed countries. This linkage solves a pervasive political problem for the poor, particularly in modern democracies. The same characteristics that make them poor, such as lack of education, also deprive them of political influence.

Moreover, the poor are even less likely than other groups defined by a particular characteristic to wield influence in modern democracies.¹³ The poor are a diffuse group and have few resources to spend in becoming organized as an effective lobby.¹⁴ Moreover, even if the poor somehow united, they would be relatively ineffective because they have few resources other than their votes to contribute. The consequences of this fact seem apparent in the federal budget of the United States: the largest and most well supported programs are not programs for the poor, but rather are middle class entitlements.¹⁵

Thus, the question is how to link the interests of the poor to a more influential group. The difficulty is to find a surrogate group whose interests are aligned with poor. Unfortunately, the efforts to help the poor in the United States suggest that those who purport to speak for them often have different objectives. For instance, although the war on poverty created benefits for middle-class bureaucrats, there is substantial evidence that it actually hurt the poor.¹⁶

12. See McGinnis & Movsesian, *supra* note 6, at 557-58.

13. See John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999).

14. *Id.* at 462.

15. See *id.* (citing Ben W. Heineman, Jr., *The Law Schools' Failing Grade on Federalism*, 92 YALE L.J. 1349, 1353 (1983) (pointing out that middle-class entitlements crowd out programs for the poor)).

16. See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW*

Similarly, legislation that benefits teachers' unions seems to increase the drop-out rate in public high schools, which disproportionately hurts the poor.¹⁷ These results should not be surprising, because there is no reason to believe that legislation intended to help majoritarian interests or special interest groups will systematically help other diffuse groups.

Even the share of general resources shaken loose and shifted incidentally to the poor by the kind of redistributionist legislation pursued by interest groups may be outweighed by the disincentives or other bad effects that the legislation has on the poor.¹⁸ Welfare programs are a prime example. Powerful public service unions support welfare because it requires a structure that provides jobs to their members.¹⁹ The disincentives to work caused by welfare are at best irrelevant to the interests of union members. Thus, the members may oppose programs to alleviate such disincentives whenever such programs would threaten their interests even mildly, as when welfare recipients are given jobs that conceivably could be given to union members.²⁰

In creating structures that will help the poor, it is thus useful to facilitate some group effective at lobbying that benefits from the same policies that will benefit the poor. Concentrated interest groups that benefit from the lifting of market restrictions are a prime example of such a group. Lifting restrictions benefits entrepreneurs as well as the poor by permitting new entry in markets, thereby lowering the price of goods or services. Government monopolies over primary and secondary schools are a case in point. Concentrated interest groups, like educational entrepreneurs and religious institutions want to eliminate the public monopoly over education, and the dissolution of the monopoly may serve the interests of the poor by delivering better educational services.

CONCLUSION

The key to advancing the interests of the poor is to structure society to empower those politically organized groups who have interests in common with the poor. Frequently, those who say they have common interests actually have quite divergent interests. Fortunately, the WTO's empowerment of export interest groups have given a greater voice to the poor of the developing world in the politics of the developed world. We should applaud this aspect of the WTO and search for similar mechanisms elsewhere in the law to accomplish the same objective.

IT CHANGED AMERICA 148-53 (1991); CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* at 24-40 (1984).

17. See Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, 111 Q.J. ECON 671, 700-09 (1996).

18. See DWIGHT R. LEE & RICHARD B. MCKENZIE, *FAILURE AND PROGRESS: THE BRIGHT SIDE OF THE DISMAL SCIENCE* 109 (1993).

19. See LEO TROY, *THE NEW UNIONISM IN THE NEW SOCIETY: PUBLIC SECTOR UNIONS IN THE REDISTRIBUTIVE STATE* 136 (1994).

20. See Ron Suskind, *Labor Is Pushing Clinton to Make Sure Message of Workfare Is That It's Just a Job, Not a Career*, WALL ST. J., Feb. 9, 1994, at A16.

RAISING ISSUES OF PROPERTY, WEALTH AND INEQUALITY IN THE LAW SCHOOL: CONTRACTS & COMMERCIAL LAW SCHOOL COURSES

VERYL VICTORIA MILES*

INTRODUCTION

Raising the subject of the rights of the poor and under-represented in the law is a discussion that law school professors have engaged in for years. Most recently, this question was given considerable attention at the 2001 Annual Meeting of the Association of American Law Schools. In a day long workshop, law school faculty members were given the opportunity to consider the impact of wealth inequality in society and how it affects the goal of pursuing and achieving equal justice under the law.¹ The inaugural plenary session of the workshop raised the consciousness of participants about the great wealth disparity between whites and African-Americans and the role that housing segregation has played in perpetuating economic and social disparities between whites and African-Americans.²

As lawyers we find ourselves confronted with the reminder that this unfortunate disparity was made possible, and consequently relegated to a kind of perpetuity, through our legal systems and laws. At the same time we can take some comfort in knowing that it has been and will continue to be possible for the socially committed and conscious lawyer to challenge the discriminatory housing and lending practices to lessen the divide.³ As legal educators, the challenge

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1. The Association of American Law School's Annual Meeting for 2001 was held in San Francisco, California. During this meeting a workshop on Property, Wealth and Inequality was held on January 4, 2001. This topic was highlighted in a smaller forum at the Association's annual meeting in 1993 which included a program on "Hardship Visible: Teaching About Poverty and Class Through the Law School Curriculum."

2. The plenary session of the program included presentations by Melvin L. Oliver, co-author of *Black Wealth/White Wealth: A New Perspective on Racial Inequality*, and Nancy A. Denton, co-author of *American Apartheid: Segregation and the Making of the Underclass*.

3. Federal laws have been in effect for over thirty years to prohibit discrimination in the housing and mortgage lending markets. See Fair Housing Act of 1968, 42 U.S.C. §§ 3610-3619 (1994); Equal Credit Opportunity Act of 1979, 15 U.S.C. §§ 1691-1691(f) (1994); Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801-2810 (1994); Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901-2905 (1994). Unfortunately, the problem of discrimination in housing and mortgage lending remains prevalent and seems far from cured. See Anne P. Fortney, *Fair Lending Law Developments*, 54 BUS. LAW. 1329 (1999); Fred Galves, *The Discriminatory Impact of Traditional Lending Criteria: An Economic and Moral Critique*, 29 SETON HALL L. REV. 1467 (1999); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617 (1999); Mark Seitles, Comment, *The Perpetuation of Residential Racial Segregation in America: Historical*

remains for us to prepare our students to be ever vigilant in questioning our legal system that perpetuate inequality among members of our communities who have been and continue to be systematically disenfranchised from the enjoyment of wealth benefits and opportunities in our society.

Accordingly, one of the questions law professors were asked to consider in this workshop was how to raise student consciousness about the unequal treatment of individuals under laws that appear to be neutral in application and effect, but in reality are often disparate in the treatment of the "haves" and the "have-nots."⁴ The importance of raising this question with law students has not gone ignored and has prompted many law professors to take the challenge of raising these questions directly in their courses. Fortunately, several of these professors have been very thoughtful in reflecting on their experiences and observations about the benefits and risks of pursuing these questions in law school courses.⁵

In reviewing the different experiences shared by these professors, several common objectives and observations were found in their assessment as to why issues of poverty, inequality and diversity need to be presented in law school curriculums. It has been noted that most law students come to law school with the assumption that the law is always neutral and just, regardless of differences in class, economic status, race, and/or gender from one individual to another.⁶ A corresponding benefit in bringing these issues to the classroom discussion is that the students' "intellectual capacit[ies]" are challenged, and they are pushed to become more empathetic in their representation of clients, as they become aware of the specific and individualized needs of a client to form effective

Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies, 14 J. LAND USE & ENVTL. L. 89 (1998).

4. The workshop included a series of concurrent break-out sessions on "pedagogy" so that workshop participants could discuss ways to raise issues addressing property, wealth and inequality in law school courses.

5. Several articles offer significant insight about the value and need for raising issues about poverty, wealth, race, age and gender in traditional law school courses. See Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541 (1996); Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. LEGAL EDUC. 199 (1993); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Lois Johnson & Louise G. Trubeck, *Developing a Poverty Law Course: A Case Study*, 42 WASH. U. J. URB. & CONTEMP. L. 185 (1992).

6. In an Antitrust course taught by Professor Dark, she provided her students with an example of how a consideration of the differences in the business practices and motivations of Japanese manufacturers from those of American or Western businesses could have resulted in a different outcome in the Supreme Court's application of Sherman Act anti-predatory pricing regulations in its decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See Dark, *supra* note 5, at 548-49.

arguments in the advocacy for appropriate relief for each client.⁷ Additional benefits accrue in bringing the face of diverse clients to the attention of students and requiring them to consider how to provide effective representation for different clients with different circumstances and needs. One is able to stretch student development of lawyering skills in the areas of client counseling and interviewing as well as their analytical and advocacy skills.⁸ Another observation made by these professors was that in discussing ways to help clients who are at economic or other social disadvantages, students are given an opportunity to see the different “roles lawyers have played and should play in trying to bring about social change to benefit disadvantaged or subordinated groups.”⁹

While there were common observations between these law professors, it is important to note one distinction in experience, their reflections regarding student responses to having these issues being a part of a law school course. In courses that were specifically designed to focus on these issues, such as courses

7. *Id.* at 544.

8. Professor Bill Ong Hing wrote about his experience in the Stanford Law School’s Law and Social Change Curriculum which he described as “intended to attract students who wanted to work with subordinated or disadvantaged communities or in public interest law.” Hing, *supra* note 5, at 1807. This program is mostly skills centered with a live clinic component. He provides an interesting assessment of how a program focusing on the problems of the poor can challenge and enhance the overall lawyer skills of law students. *See id.* at 1808-11; *see also* Dark, *supra* note 5, at 553-54.

[S]tudents must maintain their ability to use their alternate problem-resolving systems, including personal experience and perception, in tandem with the legal analysis. Discussions about diversity issues help students to learn how to integrate their personal experience and resolution strategies. . . . A multiple-perspectives approach enables students to develop more effective arguments on behalf of their clients.

Id.

9. Hing, *supra* note 5, at 1807. Professors Erlanger and Lessard describe the experiences of law school participants in The Interuniversity Consortium on Poverty Law, which was created to increase and improve “law school scholarship and teaching about the relationship of the legal system to poor, disadvantage, or marginalized persons.” Erlanger & Lessard, *supra* note 5, at 199. They noted:

Working from the premise that legal forms constrain the ability of community organizations to improve their neighborhoods, [the program sought] to help the organizations become more adept at manipulating the forms. In practice, that aim requires an understanding of corporate and tax law, and of the way business advisors deploy their knowledge in the service of their clients. The hope is that, with this experience at their disposal, community organizations will be able to achieve socially valuable goals.

The project aims to show students how lawyers can make a difference as advisers rather than litigators; to make a meaningful difference for the client groups served; and to help persons within the university understand how community groups work, and how the law can help them pursue their goals.

Id. at 212.

on poverty law or law and social change, students came into the courses expecting these issues to be central to the course and were not as resistant.¹⁰ However, the student receptivity to such issues in traditional law school courses, where there is no expectation on the part of students that questions regarding wealth and inequality, race, gender or class differences would be raised, was not necessarily positive.¹¹ Having noted this outcome, however, is not to suggest that these issues should not be raised. To the contrary, the integration of these broader and diverse issues has been recommended to broaden student experiences and understanding of the law, how the law affects everyone and how lawyers can be a greater part of achieving equal justice under the law for all.¹²

I. RAISING ISSUES OF WEALTH AND INEQUALITY IN A CONTRACTS/COMMERCIAL LAW COURSE

A. Introducing Wealth and Inequality in A Contracts/Commercial Law Course

Having reached the decision to raise the face of the poor, under-represented and disenfranchised persons throughout the law school curriculum, the next question is how to do it effectively and in a way that enhances one's course objectives. In preparing for the workshop session on contracts and commercial law courses, I was able to draw on some of my own course experiences and observations in raising these questions in the Creditors' and Debtors' Rights course that I teach at my law school.

This course provides students with a survey of state laws and remedies that are used by creditors and debtors in the enforcement of debt obligations through remedies such as prejudgment attachment, judicial liens, writs of execution,

10. See Hing, *supra* note 5, at 1822-26.

11. See Dark, *supra* note 5, at 554-75 (offering a description of challenges one faces in raising these issues in traditional law courses, as well as advice and actual student responses to her courses); see also Erlanger & Lessard, *supra* note 5, at 207-09 (including a description of student reactions to a required course entitled Legal Theory and Practice that was offered at the University of Maryland which was designed to "construct an understanding of legal process, inseparably coupled to a conception of responsibility to the poor").

12.

Students need to hear all professors address diversity issues. Typically, only a few implicitly or explicitly designated spokespersons for 'special interests' will raise these issues. Everyone, however, is responsible for changing society so that it is far more inclusive and fair to all members of the community. In addition to teaching students substantive law, professors, willingly or unwillingly, are role models for our students. We should take that role very seriously and model for our students our vision and concern for legal and social change. More importantly, while we all certainly do not share the same vision, we can demonstrate that we have visions and that our own visions and consciences play vital roles in our lives as lawyers.

Dark, *supra* note 5, at 556-57.

statutory and consensual liens, garnishment and equitable liens, and various remedies and special collection rights under Articles 2 and 9 of the Uniform Commercial Code (UCC), the Uniform Fraudulent Conveyances Act and state law exemption rights. Because this course is only offered for two credit hours, the professor is always in a race to meet course coverage demands for a wide range of very important collection remedies. In order to meet these coverage objectives through an intensive and critical study of both relevant state laws and decisional law, with a very significant amount of problem sets to reinforce student understanding and application of these remedies, the added objective of raising the question of fairness and equal treatment under these laws for the low income and economically disadvantaged individuals is a challenge.

My approach in raising the plight of economically disadvantaged individuals in a course where students are predisposed to learning the nuts-and-bolts of collection remedies available to lenders and other creditors was to be direct and to do this in the first class of the semester. The decision to do this in the first class, as opposed to waiting until the conclusion of the course, was both pragmatic and strategic. It was pragmatic because the large volume of substantive issues to be covered would delay raising these issues later so that there might not be enough time for meaningful discussion of the disparate treatment of the poor under collections law and its system. It was strategic because planting the seed to think about these issues of fairness in the beginning of the course would give this discussion a place of prominence throughout the course.

The students were forewarned that while the course was entitled "Creditors' and Debtors' Rights," they would find that state law rights and remedies available to creditors and debtors to enforce debt obligations were primarily creditor-centered and creditor-friendly. Without getting on a soapbox to raise this issue, I was able to find some video presentations produced by consumer credit advisory organizations that were very effective in introducing struggling consumer debtors and their various plights to my students.¹³ The videos included interviews with individual debtors who told their personal stories of how they had become overburdened by their debt obligations, and how they were unable to pay all of their debts.

Most of the debtors in the video presentations were women and minorities. They included a single mother of young children with little or no professional training who had been laid off due to her employer's decision to relocate. Her limited savings quickly depleted, and her new job did not pay enough to both cover debts and support her family. There were retired widows whose social security benefits were insufficient to meet their needs and indebtedness. A divorcee, who during her marriage had stayed home to raise her family, was profiled as she struggled to find ways to make ends meet. There was also the young adult recently graduated from college who had not used credit cards wisely

13. Videotape: *Consumer to Consumer: Good Ideas for Tough Times* (Rutgers Cooperative Extension 1997) (on file with author); Videotape: *Going Broke in America: Bankruptcy and Your Alternatives* (Consumer Credit Education Foundation 1992) (on file with author).

and had accrued credit card balances in the thousands of dollars and was sinking further and further in debt as interest quickly accrued on credit card balances.

These individuals were eloquent and powerful in explaining their paths to their current situations. The relief they found would not be in the law as much as in credit counseling assistance, where the consumer counseling agencies would intervene on their behalf with their creditors to restructure debt payments and interest charges. These counselors also helped the individual debtors to identify ways to readjust purchasing and spending practices as well as new lifestyles to make much needed financial rehabilitations. The videos also showed individual debtors gathering together to share personal stories and advice on surviving with less and finding their way out of these financially distressful periods.

After viewing the video, the students were moved by these powerful stories.¹⁴ The debtors immediately became real people and not simply defendants. The plight of the poor or financially distressed person was given a place in the course that would be considered at different times throughout the semester. This almost certainly changed the student attitudes about defaulting debtors; no longer were they viewed as deadbeats, but they became individuals in need of help.

B. Discussions of Wealth and Inequality in the Contracts/Commercial Law Course

While coverage of the different substantive topics of the course was a primary objective for me during the semester, several opportunities arose that allowed the class to consider how the various collection remedies studied might have different or more adverse effects on the low income consumer debtors as opposed to business debtors or more economically secure debtors.¹⁵ One such occasion was found in the study of the course unit on prejudgment attachment

14. Although the video was a wonderful resource for presenting the plight of the consumer debtor to my students, effective sources can also be found in newspaper articles or current media events, consumer reports, empirical studies on consumer debt and consumer credit lending practices, as well as students sharing relevant personal experiences. See Hing, *supra* note 5, at 1808, 1831-32; Dark, *supra* note 5, at 555; Erlanger & Lessard, *supra* note 5, at 207.

15. The consideration of unequal treatment of low income consumer debtors was not addressed in every class or with the study of every unit in my course. Professor Dark's article provides advice to others thinking about how to raise issues of diversity or inequality in traditional courses such as her anti-trust course:

The usual advice to anyone who is about to begin a new journey or project is to take it slowly. Do not feel that you must raise these issues on a minute-by-minute basis in your classes to be successful. Planning, thoughtful preparation, consultation with others (to the extent possible), and developing a way to evaluate the success of your efforts are key. Of course, as with any new skill, it does help to have these discussions as often as possible to gain more experience and comfort in incorporating diversity issues into the classroom.

Dark, *supra* note 5, at 543-44.

remedies.

The class was assigned appellate cases to review involving the constitutionality of such remedies, including the Supreme Court case *Connecticut v. Doebr*,¹⁶ which considered whether the Connecticut prejudgment attachment statute violated a debtor's right to due process under the Fourteenth Amendment of the Constitution. In our discussion of this opinion and what the Court identified as lacking in terms of due process protections in the Connecticut statute, students began to review the selected state prejudgment attachment statutes assigned for class discussion. One student had volunteered to look at the prejudgment attachment and garnishment law for the District of Columbia¹⁷ and suggested that the D.C. statute might be in violation of the due process rights of D.C. residents.¹⁸ This student was particularly interested in the D.C. statute because he had witnessed the use of the prejudgment garnishment remedy against low income clients in our law school's clinic.

This observation allowed the class to engage in a critical analysis of the D.C. statute and also raised the question of why a creditor would use such a remedy against a low wage income debtor. This question reaffirmed a prior conversation about the leverage effects that collection remedies like garnishments have for creditors who know the remedy will not yield much in terms of payment, but will cause the debtor to find other resources to pay the creditor quickly in order to get the creditor off the debtor's back. Accordingly, this exercise allowed the class to think about the plight of the low-income debtor who faces the consequences of a prejudgment garnishment remedy, and it sparked a willingness in the students to question existing statutes and scrutinize them as possible violations of due process protections.

Another opportunity that arose allowing the class to see the diverse impact that commercial laws can have on the low-income debtor was our study of the unit on lender liability. The study was based on common law theories such as breach of fiduciary duty, duress, negligence, breach of duty of good faith, as well as lender-liability under Article 9 of the UCC.¹⁹ In studying lender liability under the UCC, students were assigned cases where the debtors had attempted

16. 501 U.S. 1 (1991).

17. D.C. CODE ANN. § 16-501 (2000).

18. It is worth noting that in *Connecticut v. Doebr* the Supreme Court consulted a survey of the requirements of various State attachment provisions, including the requirement of the District of Columbia. It indicated that unlike the Connecticut law, the D.C. statute only permits the remedy of attachment when some exigent circumstances are present. It does not require a pre-attachment hearing but a post-attachment hearing is required, and a bond must be posted. *See Doebr*, 501 U.S. at 17-18. Although the survey was consulted by the Court to compare the prejudgment attachment statutes in the fifty States, it stated that "the statutory measures . . . surveyed are [not] necessarily free of due process problems or other constitutional infirmities in general." *Id.* at 18.

19. *See* BARKELY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶12.05 (2d ed. Supp. 1993) (offering a thorough review of the distinctions drawn in the law regarding lawful consumer credit foreclosure practices and commercial foreclosure practices).

to win damages against creditors on the grounds that creditors had failed to comply with repossession and/or liquidation requirements under sections 9-503 and 9-504 of the UCC. When determining whether there has been an improper repossession under section 9-503, one must demonstrate that a breach of peace occurred in the creditor's attempt to repossess.²⁰ When determining whether there has been an improper liquidation under section 9-504, one must have evidence that the sale was conducted in a commercially unreasonable manner and that the debtor was given reasonable notice of the sale.²¹ In determining whether there was a breach of peace in a repossession, or if a sale was not conducted in a commercially reasonable manner, or that notice of the sale was reasonable, the question is determined by the facts of each case.

Accordingly, an analysis of different factually-sensitive lender liability cases gives students an appreciation of the importance of having a deep understanding of the individual perspective of each client in developing the client's best argument. By creating an exercise for students to develop arguments for both a business debtor and a low income consumer debtor who wants to bring actions against the same lender for failure to comply with UCC requirements for a repossession and a resale of the collateral, the students are able to contrast the outcome of such cases. In addition, the students can appreciate the fact that the lawful collection practices a creditor employs with respect to a business debtor may not be lawful collection actions against a consumer debtor.

As indicated by other law professors who have introduced client diversity in their courses, this kind of exercise heightens the student's appreciation of the particular circumstances of each client. Again, such an exercise raises student consciousness about the low-income client's plight, sharpens their advocacy skills, helps them to appreciate the importance of client interviews as an essential

20. Section 9-503 of the UCC is a self-help remedy of repossession for secured creditors and provides:

Unless otherwise agreed a security party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done *without breach of the peace* or may proceed by action.

U.C.C. § 9-503 (1998) (emphasis added).

21. Section 9-504(3) of the UCC lists the requirements that secured creditors must satisfy when they elect to resell repossessed collateral:

Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but *every aspect of the disposition including the method, manner, time, and place and terms must be commercially reasonable*. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor*, if he has not signed after default a statement renouncing or modifying his right to notification of the sale.

U.C.C. § 9-504(3) (1998) (emphasis added).

part of preparing for a case and teaches them that this process needs to be more than a perfunctory task. It also gives the professor an opportunity to emphasize the importance of making legal services available to these individuals, who are in most cases less likely to have access to legal representation other than through community legal services organizations or through pro bono services.

C. Wealth and Inequality Issues from a Clinical Perspective

Another way to bring the problems of low income consumers into a traditional contracts/commercial law course is to invite faculty from law school clinical programs to share some examples of challenges they have encountered in their representation of low income clients. What is particularly attractive about this source is that cases handled through the clinic are often very topical, reflect current business practices that victimize low income consumers and show where legal representation is most needed.²²

Examples of such cases might include predatory lending cases involving elderly, low-income homeowners who enter into loans with sub-prime lenders to finance home repairs, often offered by a contracting company that also serves as a sales agent for the sub-prime lender. These cases can involve facts whereby the debtor has signed an equity mortgage contract, the terms of which are extremely complicated and difficult to understand. In addition, it is common to find that in filling out financial statements, the borrower has been encouraged by the sales/lending agent to make misrepresentations about the financial condition of the borrower to help in qualifying for the loan. Accordingly, the debtor becomes implicated in a fraud. Over time these high interest rate mortgages may have to be refinanced due to the debtor's inability to pay the monthly installment payments. Often these mortgages are sold to large lenders who will ultimately foreclose against the borrowers' home.

A case like this will provide the class with an opportunity to raise commercial law questions both about the validity of the contract as a contract of adhesion and the impact of the holder in due course doctrine as a defense for the assignee bank who purchases mortgages from sub-prime lenders. In addition to the opportunity to discuss the legal issues this kind of case raises, students can be informed about the financial and time costs associated with litigating these cases, the importance of securing legal representation for such clients, and the need to obtain additional regulation at both the state and federal level to curb predatory lending practices.²³

22. In my own effort to find current topics regarding contracts and commercial law related to problems affecting the poor or low-income clients, Mr. Michael McGonnigal of the Columbus Community Service Legal Clinic at the Catholic University of America was most helpful in describing some of the troubling cases he has observed or participated in as counsel. His observations were most appreciated and very revealing concerning the need to make legal representation and counsel available to the poor and low-income members of our communities.

23. Several recent articles discuss the challenges of litigating predatory lending cases. See, e.g., Julia Patterson Forrester, *Constructing a New Theoretical Framework for Home Improvement*

Consumer contract fraud cases are often seen in the clinic and are an effective way to address the plight of the low income client in class discussions. Other contracts/commercial law cases that involve victimization of low income clients have included individuals who receive telephone solicitations by credit card companies selling a variety of insurance policies such as accident, burial and credit card insurance. For an elderly client who does not understand that such insurance is not term-life insurance, but believes that in acquiring such insurance they are getting additional life insurance for beneficiaries, the financial costs of such insurance can be devastating given their fixed income level.

In a case that came before our clinic, such a client paid for the insurance on her credit card, the balance of which increased significantly with the monthly premiums and the high interest rate of the card. Eventually the client was unable to make the payments on the insurance and the credit card issuer canceled the card and subsequently sued the client for the balance. Our clinic attorney reported that in representing the client, a countersuit was brought against the credit card issuer for consumer fraud, which under D.C. consumer fraud laws allows for treble damages. The countersuit prompted the credit card issuer to settle the matter.

Consumer fraud cases are particularly prevalent in home repair contract cases. One such case handled in our clinic involved a roof replacement contract between two contractors and an elderly woman who owned a home in a low-income neighborhood. The roofing job was unsatisfactory, leaving the client with leaks. The contract included a choice of law and choice of a forum clause so that any resulting litigation would be brought in a jurisdiction in which the consumer fraud statute did not allow for treble damages. Apparently, the part of the contract with the choice of law clause was not given to the consumer, and it was unlikely she understood its implications. Our clinic attorney brought suit against the contractor on the client's behalf. The lawyer for the contractor cited the infamous *Carnival Cruise Lines, Inc. v. Shute*²⁴ decision by the Supreme Court upholding a choice of law clause in a cruise line passage contract ticket. Our clinic prepared to appeal the trial court dismissal of its case and our clinical interns prepared a brief distinguishing the *Carnival Cruise Lines* case from this case. After seeing the brief, the contractor settled and repaired the roof, probably recognizing it was cheaper to fix the roof than pay additional legal fees in an appeal.

Having practicing attorneys who regularly represent low income clients provide examples of the kinds of contracts/commercial law issues they typically see gives students understanding that while many of the contracts and commercial law cases they study in law school are often presented to them from a business client's perspective, these laws also impact non-business clients and poor clients. It also demonstrates that not every case will require a full-blown trial for resolution. Rather, challenging lenders or business creditors regarding

Financing, 75 OR. L. REV. 1095 (1996); Frank J. Lopez, *Examining the Viability of Bringing a Predatory Lending Class Action*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 258 (2000).

24. 499 U.S. 585 (1991).

the fairness or legality of their transactions with a low income client might be sufficient to cause them to reconsider debt enforcement actions against the client. Accordingly, students can see that not all legal services for poor clients have to be extremely time consuming and costly to be effective in getting a desired result for a deserving client.

CONCLUSION

The benefits of raising issues of poverty, wealth and inequality in law school courses can be manifold. By introducing the face of poor, under-represented and diverse individuals throughout the law school curriculum, we challenge our students to take a more critical look at the fairness and equity that is meted out through our legal systems for all members of our communities, the powerful and the powerless. As noted by others who have embraced the need for such issues to be integrated in all law school courses, the students are further benefitted by the intellectual stretch required to provide effective advocacy for diverse clients. A companion to the intellectual challenge is the opportunity to appreciate the importance of client interviewing and counseling skills necessary for effective lawyering.

Perhaps the most significant benefit is raising student compassion for the disadvantaged client who is ignorant about the law, who lacks knowledge about what is fair and unfair in business practices and who has limited or no ready access to legal representation. Perhaps through such an experience in a law school course, students will embrace the importance of making their services available to those who might not otherwise have such access. This might be manifested by our students becoming lawyers who will make career commitments to providing pro bono services to the low income client or by participating in community programs where lawyers can provide information for low income community groups on how to be better consumers when seeking services, purchasing goods, obtaining credit and knowing their rights under the law.

BOOK REVIEW

POVERTY, THE UNDERCLASS, AND THE ROLE OF RACE CONSCIOUSNESS: A NEW AGE CRITIQUE OF *BLACK WEALTH/WHITE WEALTH** AND *AMERICAN APARTHEID***

REGINALD LEAMON ROBINSON***

The outcome of any particular experiment no longer seems to depend only upon the “laws” of the physical world, but also upon the consciousness of the observer. . . . [W]e must replace the term “observer” with the term “participator.” We cannot observe the physical world, for as the new physics tell us, there is no one physical world. We participate within a spectrum of all possible realities.¹

Children believe everything adults say. We agree with them, and our faith is so strong that the belief system controls our whole dream of life. We didn’t choose these beliefs, and we may have rebelled against them, but we were not strong enough to win the rebellion. The result is surrender to the beliefs with our *agreement*. . . . I call this process *the domestication of humans*.²

Poverty is an abnormal condition. Poverty is the result of inefficiency. Poverty is not the result of the lack of opportunity. Not in yourself, not

* MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

** DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

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1. MICHAEL TALBOT, *MYSTICISM AND THE NEW PHYSICS* 3 (1993).

2. DON MIGUEL RUÍZ, *THE FOUR AGREEMENTS—A PRACTICAL GUIDE TO PERSONAL FREEDOM: A TOLTEC WISDOM BOOK* 5-6 (1997) (emphasis in original).

anywhere. Poverty is the result of inefficiency, or ignorance. And if you and I can learn to deal with the only Mind there is, we will no longer be poor. We can attract to ourselves people and things which will obliterate that poverty. It will be a law of gravity, no other thing but principle. When you set into motion a power of mind, don't you be surprised what happens.³

INTRODUCTION

Who brings our thoughts into reality?⁴ According to Michael Talbot, we all do. Nothing of us simply watches or observes an experience. Rather, we proactively co-create experiences.⁵ We co-create in at least two ways: *deliberately* or *by default*.⁶ By deliberate, I mean that we can self-consciously intend our experiences; or by default, we can allow others to influence what we intend and thus what we experience.⁷ In this way, social experiences like

3. ERNEST HOLMES, LOVE & LAW: THE UNPUBLISHED TEACHINGS 39-40 (Marilyn Leo ed. 2001).

4. See BARBARA MARCINIAK, BRINGERS OF THE DAWN: TEACHINGS FROM THE PLEIADIANS 10 (1992) ("[T]hought creates. No matter what situation you find yourself in, it is the power of your thoughts that got you there. It is also the impeccable belief that thought creates that will transform your experience and the planetary existence."); JANE ROBERTS, THE NATURAL OF PERSONAL REALITY—SPECIFIC, PRACTICAL TECHNIQUES FOR SOLVING EVERYDAY PROBLEMS AND ENRICHING THE LIFE YOU KNOW: A SETH BOOK xvi (1994) [hereinafter cited as SETH, PERSONAL REALITY] ("Experience is the product of the mind, the spirit, conscious thoughts and feelings, and unconscious thoughts and feelings. These together form the reality that you know. You are hardly at the mercy of a reality, therefore, that exists apart from yourself, or is thrust upon you.").

5. I first introduced the concept of co-creation into the law review literature in 1996. See Reginald Leamon Robinson, *Race, Myth, and Narrative in the Social Construction of the Black Self*, 40 HOWARD L.J. 1, 55 n.240 (1996).

6. See generally JERRY HICKS & ESTHER HICKS, ABRAHAM SPEAKS: A NEW BEGINNING I—HANDBOOK FOR JOYOUS SURVIVAL (1996) [hereinafter cited as HICKS & HICKS, ABRAHAM SPEAKS I].

7. 3 LEE CARROLL, KRYON—ALCHEMY OF THE HUMAN SPIRIT: A GUIDE TO HUMAN TRANSITION INTO THE NEW AGE 76 (1995). The Kryon writes:

For to co-create means that you and Spirit and those around you create your own reality. This may seem like a paradox to you, for you have been told only to co-create for yourselves. But what happens when you start to co-create for yourself is that those around you are affected in a positive way. . . . As you co-create for yourself, others are touched and helped; some are even enlightened! . . . and all because you co-create for yourself.

Id. See Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231 (2000). In this essay, I described co-creation in the context of race and white supremacy.

By co-creation, I mean that each of us has been socially conditioned, principally in our primary environments, to accept that race, race consciousness (i.e., thinking of ourselves

poverty, wealth, and residential segregation do not simply happen. Some of us play the role of the wealthy, and some the poor. But we actively intend or passively allow all of these experiences (e.g., poverty).⁸ According to Don Miguel Ruíz, earth and personal dreams work concertedly to reinforce larger social practices and to limit how individuals might re-imagine what a world could be.⁹ For Ruíz, earth dreams approximate macro- or social structures. And for him, personal dreams constitute personal experiences or realities. Together, they serve as the basis for parents (or the state) to shape our beliefs.¹⁰ According to Ruíz, our parents “hook” our *attention*,¹¹ and in so doing they shape how we think¹². And how we think reinforces what is “reality.”¹³ By focusing our attention, parents and society play profoundly important roles in shaping our

in racial terms), racism, and white supremacy are naturally occurring (i.e., human nature) and socially inevitable [i.e., human history]. Once we accept that this inevitable social reality is upon us, we consciously and unconsciously focus our minds on race. This focus alone is sufficient to create and maintain race and race consciousness. However, despite this focus, each of us experiences race and race consciousness differently. . . . It is this difference that creates the opportunity for new thinking with each generation on race and race consciousness, and it is this difference that will eventually give so-called black people the courage to think of themselves without any veil of race and without any overlay of race consciousness.

Id. at 232-33 n.2 (citations omitted).

8. SETH, PERSONAL REALITY, *supra* note 4, at 31 (“If you are poor you may feel quite self-righteous in your financial condition, looking with scorn upon those who are wealthy, telling yourself that money is wrong and so reinforcing the condition of poverty.”).

9. See RUÍZ, *supra* note 2, at 7-8 (“We pretend to be what we are not because we are afraid of being rejected. The fear of being rejected becomes the fear of not being good enough. Eventually we become someone that we are not. We become a copy of Mamma’s beliefs, Daddy’s beliefs, society’s beliefs, and religion’s beliefs.”).

10. *Cf.* Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981), *aff’d*, 669 F.2d 67 (2d Cir. 1982) (“Although the possibility for parents to act in other than the best interest of their child exists, the law presumes that the parents ‘possess what the child lacks in maturity’ and that ‘the natural bonds of affection lead parents to act in the best interest of their children.’”).

11. RUÍZ, *supra* note 2, at 3 (“*Attention* is the ability we have to discriminate and to focus only on that which we want to perceive. We can perceive millions of things simultaneously, but using our attention, we can hold whatever we want to perceive in the foreground of our mind. The adults around us hooked our attention and put information into our minds through repetition. That is the way we learned everything we know.”).

12. See HICKS & HICKS, ABRAHAM SPEAKS I, *supra* note 6, at 42 (“As you enter physical experience, you are surrounded by beings who have already arrived at many conclusions. They have created within themselves many beliefs based upon the life experience that they have lived – or upon the stories that they have heard from those who surrounded them at the time that they were born.”).

13. 1 NEALE DONALD WALSCH, CONVERSATIONS WITH GOD: AN UNCOMMON DIALOGUE 107 (1996) (“We make real that to which we pay attention. The Master knows this. The Master places himself *at choice* with regard to that which she chooses to make real.”).

thoughts, our reality (e.g., poverty).¹⁴

By thought, I mean *consciousness*,¹⁵ and consciousness produces a *material reality* (or material privations).¹⁶ Consciousness influences how we think, talk, and act.¹⁷ By *think*, I mean the manner in which people process their inner beliefs, a thinking that gets governed by how people believe and thus perceive "reality."¹⁸ By *talk*, I mean the manner in which people use words. According to Ruíz,

the word is not just a sound or a written symbol. The word is a force; it is the power you have to express and communicate, to think, and thereby to create the events in your life. . . . The word is the most powerful tool you have as a human; it is the tool of magic.¹⁹

By *act*, I mean daily living (e.g., physical action and dynamic interaction) that

14. See C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 3-4 (1999). Mills argues: Seldom aware of the intricate connection between the patterns of their own lives and the course of world history, ordinary men do not usually know what this connection means for the kinds of men they are becoming and for the kinds of history-making in which they might take part. They do not possess the quality of mind essential to grasp the interplay of man and society, of biography and history, of self and world. They cannot cope with their personal troubles in such ways as to control the structural transformations that usually lie behind them.

Id.

15. Consciousness has many different and competing definitions. Some definitions lend themselves to the esoteric, while some harbor a scientific basis that is no less esoteric. See, e.g., 1 JANE ROBERTS, *THE "UNKNOWN" REALITY: A SETH BOOK* 42 (1988) ("Consciousness is composed of energy, with everything that implies. The psyche, then, can be thought of as a conglomeration of highly charged 'particles' of energy, following rules and properties, many simply unknown to you."). See also GERALD M. EDELMAN & GIULIO TONONI, *A UNIVERSE OF CONSCIOUSNESS: HOW MATTER BECOMES IMAGINATION* 18 (2000) ("[E]ach conscious state is experienced as a whole that cannot be subdivided into independent components [E]ach conscious state is selected from a repertoire of billions and billions of possible conscious states, each with different behavioral consequences. . . . This [approach] expands on William James' prescient notion of consciousness as a *process*—one that is private, selective, and continuous yet continually changing.").

16. Cf. TALBOT, *supra* note 1, at 102 ("Consciousness can act on Matter and transform it. This ultimate conversion of Matter into Consciousness and perhaps one day even of Consciousness into Matter is the aim of the *supramental yoga*.").

17. See generally Reginald Leamon Robinson, "Expert" Knowledge: *Introductory Comments on Race Consciousness*, 20 B.C. THIRD WORLD L.J. 145 (2000); Robinson, *supra* note 7, at 231.

18. See HICKS & HICKS, *ABRAHAM SPEAKS I*, *supra* note 6, at 42 ("As you are stimulated to think about beliefs that others offer, very often you attract life experience that 'proves' to you that it is just as they have said that it is. For as you believe that it is, it is, and for that reason, beliefs change very slowly.").

19. RUÍZ, *supra* note 2, at 26.

depends on how a person believes and talks.²⁰ By acting, we confirm that our beliefs and our narrative must be true. Few of us act against our spoken or internalized beliefs. In effect, thinking, talking, and acting form overlapping concentric circles, all of which intensify what is actually or potentially real, and they determine how we might probably act.²¹ We do not act against our thoughts, and we speak in a manner that reinforces what we already believe or know.²² In sum, our beliefs (i.e., thinking) inform how we declare to others and reinforce in ourselves (i.e., talking) why we live as we do (i.e., acting). Therefore, in this essay, I will simply use the term “consciousness,” and when I do, the reader should recall thinking, talking, and acting.

In America, race and racism color our consciousness.²³ A *race consciousness* operates like *thinking*, *talking*, and *acting*. By race consciousness, I adopt Janet E. Helm’s definition: “Race consciousness refers to the awareness that (socialization due to) racial-group membership can influence one’s intrapsychic dynamics as well as interpersonal relationships. Thus, one’s racial awareness may be subliminal and not readily admitted into consciousness or it may be conscious and not readily repressed.”²⁴ By constructing our experiences through a race consciousness, we deliberately poison our personal worlds, not realizing that we also sicken, injure, and destroy ourselves.²⁵ By living through a “race-

20. *Id.* at 4. Ruiz states: “The outside dream hooks our attention and teaches us what to believe, beginning with the language that we speak. Language is the code for understanding and communication between humans. Every letter, every word in each language is an agreement.” *Id.*

21. *Cf.* EDELMAN & TONONI, *supra* note 15, at 201. Thinking and language play a crucial role in perception.

[W]e must review the relationship between internalist and externalist views of the mental. The internalist view (a first-person view) is that as we interact with the world to establish our beliefs, their content is determined by particular kinds of brain activity that are reachable by introspection. The externalist view (a third-person view) is that mental life is a construct that is mainly dependent on the interpersonal or social exchanges that are based on language. According to this view, the whole system of language is essential to thought; it is the public aspect of language that gives thought its meaning and that is the basis of mental content.

Id.

22. SETH, PERSONAL REALITY, *supra* note 4, at 19. Seth states:

Each person experiences a unique reality, different from any other individual’s. This reality springs outward from the inner landscape of thoughts, feelings, expectations and beliefs. If you believe that the inner self works against you rather than for you, then you hamper its functioning – or rather, you force it to behave in a certain way because of your beliefs.

Id.

23. See generally DOCUMENTS OF AMERICAN PREJUDICE: AN ANTHOLOGY OF WRITINGS ON RACE FROM THOMAS JEFFERSON TO DAVID DUKE (S. T. Joshi ed., 1998).

24. Janet E. Helms, *Introduction: Review of Racial Identity Terminology*, in BLACK AND WHITE RACIAL IDENTITY: THEORY, RESEARCH, AND PRACTICE 3, 7 (Janet E. Helms ed., 1990).

25. See, e.g., PATRICIA RAYBON, MY FIRST WHITE FRIEND: CONFESSIONS ON RACE, LOVE,

focused consciousness," we reinforce America's notion of blacks,²⁶ and we pay homage to the vested limitation that prior black family generations have passed on too.²⁷ Yet, with such a "race-focused consciousness," we shut ourselves off from other probable realities.²⁸ By shutting ourselves off, we resist change, oppression, or injustice, thus assuming that oppression for example must be a true, external reality.²⁹ As we learned from Seth, all realities are probable, and as we change our thinking, we co-create new probable realities and new probable selves.³⁰ In this way, race does not use us. Rather, we experience race if and only if we give our attention to race and its consciousness. That is, we co-create reality from the inside out,³¹ and in this way as Ruíz pointed out, society—media,

AND FORGIVENESS 2 (1996) ("And I thought my soul would die from [hating]. [Hate] was killing me anyway—this race-focused consciousness—because it confined my spirit and my vision and sanity too. And I felt pathological—as confused and mixed up as some white sociologists have always claimed African Americans naturally are.").

26. See, e.g., MASSEY & DENTON, *supra* note **, at 94 ("White apprehensions about racial mixing are associated with the belief that having black neighbors undermines property values and reduces neighborhood safety."). See also Janet E. Helms, *Toward a Model of White Racial Identity Development*, in BLACK AND WHITE RACIAL IDENTITY, *supra* note 24, at 54 ("[S]ignificant persons in one's life (e.g., media, parents, peers) inform one of the existence of Blacks as well as how one ought to think about them.").

27. See generally RAYBON, *supra* note 25. See also Clarence Page, *Showing My Color: Biracial Kids Face Burdens of Two Worlds*, HOUS. CHRON., Mar. 14, 1996, at 1 ("Black Americans who have internalized white supremacist attitudes and values become agents of those attitudes and values, enforcing them in others and passing them on to new generations more effectively than the Ku Klux Klan ever could.").

28. See Janet E. Helms, *An Overview of Black Racial Identity Theory*, in BLACK AND WHITE RACIAL IDENTITY, *supra* note 24, at 9, 24 ("[S]tatements like 'You talk like you're White' imply that the speaker has the right to judge what constitutes Black speech whereas the person addressed does not and, at the same time, that the person does not measure up to Black behavioral standards in some important way.").

29. 1 WALSCH, *supra* note 13, at 102 ("You cannot resist something to which you grant no reality. The act of resisting a thing is the act of granting it life. When you resist any energy, you place it there. The more you resist, the more you make it real—*whatever you are resisting*.").

30. See generally 1 ROBERTS, *supra* note 15, at 66. According to Seth:

The body that you have is a probable body. It is the result of one line of "development" that could be taken to your particular earth personality in flesh. All of the other possible lines of development also occur, however. They occur at once, but each one simultaneously affects every other. There is actually far greater interaction here than you realize, because you are not used to looking for it. The harder you work to maintain the *official* accepted idea of the self in conventional terms, the more of course you block out any kind of unpredictability.

Id.

31. See R.D. LAING, *THE POLITICS OF EXPERIENCE* 21 (1968) ("The 'inner,' then, is our personal idiom of experiencing our bodies, other people, the animate and inanimate world; imagination, dreams, fantasy, and beyond that to even further reaches of experiences.").

parents, and peers—work exceedingly long and hard to “hook” our attention, so that we can reinforce the dominant social narrative.³² We reinforce this narrative by thinking, talking, and acting as if social reality (e.g., poverty) must be real, external, and inevitable.³³ Once we give mental intent to select a racialized lens by which to construct experiences, we—all of us—make race and its consciousness real, and by making it “real,” we limit our agency and others.³⁴

Given Talbot’s, Ruíz’s, and Seth’s positions, poverty begins within our consciousness. Unfortunately, we have racialized poverty, and in so doing, we co-create and reinforce the idea that blacks suffer poverty because they lack morality (e.g., sex), because they ignore middle-class values (e.g., thrift), and because they refuse to work (e.g., lazy).³⁵ Fortunately, poverty *ignores* morality.

32. See Ruíz, *supra* note 2, at 3. Ruiz asserts that:

By [hooking] our attention we learn a whole reality, a whole dream. We learned how to behave in society: what to believe and what not to believe; what is acceptable and what is not acceptable; what is good and what is bad; what is beautiful and what is ugly; what is right and what is wrong. It was all there already—all that knowledge, all those rules and concepts about how to behave in the world.

Id.

33. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413-14 (1989). Delgado aptly argues:

Stories, parables, chronicles, and narratives are powerful means for deploying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves. Ideology—the received wisdom—makes current social arrangements seem fair and natural. Those in power sleep well at night—their conduct does not seem to them like oppression.

Id.

34. See generally Paul Hoggett, *Agency, Rationality, and Social Policy*, 30 J. SOC. POL’Y 37 (2001) (In discussing and critiquing Anthony Giddens’ theory of structuration and human agency, Hoggett argues that we must prepare a robust account of active welfare subjects so that we can “confront the real experiences of powerlessness and psychic injury which result from injustice and oppression and [so that we can] acknowledge human capacities for destructiveness towards self and others.”). For an indepth discussion of structuration and human reflective agency, see ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* (1984) [hereinafter cited as GIDDENS, *CONSTITUTION*]; ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS* (1979).

35. See, e.g., James Jennings, *Persistent Poverty in the United States: Review of Theories and Explanations*, in *A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS* 13-38 (Louis Kushnick & James Jennings eds., 1999) (providing a general overview cultural, moral, genetic, racial, and family structure explanation for the persistent of poverty). In Jennings’ essay, he cites George Gilder, who writes: “Their problem is not poverty but a collapse of family discipline and sexual morality.” *Id.* at 18.

Whether black or white, whether good or bad, people succeed.³⁶ These people simply (but not without sustained intent and effort) focus their mental and spiritual energy. More than likely, they do not squander their time blaming racism, capitalism, or God.³⁷ In this way, Ted Turner, Reginald Lewis, Michael Millken, Madame C. Walker, or Ivan Bosky can garner wealth. Similarly, Maxine Waters, a citizen who hailed from a poor, working-class community, can achieve her dream by becoming an important member of the United States House of Representatives. Today, regardless of socio-economic status, people still "succeed" and "fail." In any event, "external" reality dynamically reflects our collective (but ever changing) inner thoughts, our impoverished self images,³⁸ and as such, society co-creates poverty and wealth.³⁹ Without us and our thinking, poverty could not sustain itself. Poverty's existence depends exclusively on the *attention* to which we give it.

As between rich and poor, black and white, what might explain the difference? Although liberal and conservative sociologists have provided us with many factors and explanations,⁴⁰ the variables are too many, too probable. What is certain, however, is that we co-create all of our experiences, including poverty, the underclass, and the wealthy. We exist to have power over others. Without wealth or poverty, we have no identity. We have no external basis by which to evaluate our inherent value. We have forgotten that we are "gods."⁴¹ We have instead enslaved ourselves to the thinking, talking, and acting of an apparent "external," objective force over which we claim no power.

36. See, e.g., THOMAS J. STANLEY & WILLIAM D. DANKO, *THE MILLIONAIRE NEXT DOOR: THE SURPRISING SECRET OF AMERICA'S WEALTH* (1996).

37. See, e.g., RALPH WILEY, *WHY BLACK PEOPLE TEND TO SHOUT: COLD FACTS AND WRY VIEWS FROM A BLACK MAN'S WORLD* (1991).

38. See KEN KEYES, JR., *HANDBOOK TO HIGHER CONSCIOUSNESS*, at xiv (5th ed. 1975).

39. See Lee Rainwater, *Neutralizing the Disinherited: Some Psychological Aspects of Understanding the Poor*, in *PSYCHOLOGICAL FACTORS IN POVERTY* 9, 10 (Vernon L. Allen ed., 1970) ("[I]n every society individuals have a conception of how their system operates and why it operates that way that is parallel to, but not identical with, an adequate sociological understanding of the social system.").

40. See, e.g., David R. Quammen, *Poverty in America: Progress Interrupted*, *METRO HERALD*, July 21, 1995, at 8 ("A few months ago, Edwin J. Fuelner, President of the Heritage Foundation, wrote in a *Washington Times* article that even with the trillions of dollars spent on the poor, poverty in 1993 is essentially the same as in 1963 (15.3 percent then versus 15.1 percent in 1993), laying blame on the personal failings of the poor."). See also Hermon George, Jr., *Black America, the "Underclass," and the Subordination Process*, in *A NEW INTRODUCTION TO POVERTY*, *supra* note 35, at 197-98 (discussing liberal and conservative explanations for the persistent of poverty and the underclass, noting that some conservative thinkers simply wish to abandon the adult black underclass "while trumpeting the virtues of low-wage work as an enforcer of social obligation").

41. *Psalms* 82:6 (King James) ("Ye are gods; and all of you are children of the most High."). See also RUIZ, *supra* note 2, at xviii ("It is true. I am God. But you are also God. We are the same, you and I. We are images of light. We are God.").

Liberal poverty studies *fault* “external,” objective forces (i.e., social structure).⁴² They premise that social structure robs citizens of equal opportunities,⁴³ and without equal opportunities, many citizens cannot attain access to material goods.⁴⁴ By social structure, I mean the manner in which social systems distribute resources like wealth, income, and property.⁴⁵ Some early poverty studies looked at individual behavior and choices.⁴⁶ Some studies focused on “learned helplessness.”⁴⁷ Others have framed their analysis on the “culture of poverty” theory.⁴⁸ Unfortunately, the work by sociologists or other scholars who look critically at “learned helplessness” or “culture of poverty” has

42. See, e.g., JIM SLEEPER, *LIBERAL RACISM: HOW FIXATING ON RACE SUBVERTS THE AMERICAN DREAM* 39-40 (1998) (“Liberals must admit that their charges of ‘racism’ are often so extenuated and exotic that they reinforce racism by making blacks seem an exotic appendage to the polity. . . . Since most liberals have qualms about saying this, they grasp at other explanations: ‘Blame the economy as well as racism; blame class as well as race.’”).

43. See generally MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA* (1983); DOUGLAS G. GLASGOW, *THE BLACK UNDERCLASS: POVERTY, UNEMPLOYMENT, AND ENTRAPMENT OF GHETTO YOUTH* (1981); WILLIAM K. TABB, *THE POLITICAL ECONOMY OF THE BLACK GHETTO* (1970).

44. See OLIVER & SHAPIRO, *supra* note *.

45. ALLAN G. JOHNSON, *THE BLACKWELL DICTIONARY OF SOCIOLOGY: A USER’S GUIDE TO SOCIOLOGICAL LANGUAGE* 295 (2d ed. 2000) (defining social structure in part as “a crucial defining concept for sociology as a way of thinking about social life”). Johnson also writes that: “The second structural characteristic of a social system includes various kinds of distributions. . . . In similar ways we can describe the structural distribution of various other products and resources of social life, from wealth and income and property to prestige and access to education and health care.” *Id.* See OLIVER & SHAPIRO, *supra* note *, at 73-80 (discussing the social distribution of wealth).

46. See, e.g., Susan Saegert & Gary Winkel, *Paths to Community Empowerment: Organizing at Home*, 24 AM. J. COMMUNITY PSYCHOL. 517, 517 (1996), available at 1996 WL 12870927 (“Social scientists’ debates about the role of behavior in perpetuating the poor life chances of those who live in the worst inner-city neighborhoods are as persistent as the poverty that characterizes these areas.”).

47. See, e.g., George Gilder, *The Collapse of the American Family*, 89 PUB. INT. 20 (1987) (attacking females who head families and government welfare programs as deteriorating the family structure and contributing to successive cycles of poverty and destructive values).

48. See, e.g., WILLIAM A. KELSO, *POVERTY AND THE UNDERCLASS: CHANGING PERCEPTIONS OF THE POOR IN AMERICA* 5 (1994) (“In the early 1960s, academics on the right like Edward Banfield had insisted that the poor were afflicted by a ‘culture of poverty,’ which made it impossible for them to ever compete successfully in the workplace.”). See also William J. Wilson, *The Ghetto Underclass and the Social Transformation of the Inner City*, 19 BLACK SCHOLAR 10 (1988). Wilson argues against “culture of poverty” which asserts that a person’s “basic values and attitudes have been internalized and thereby influence behavior.” *Id.* at 16. Rather, Wilson prefers the theory of “social isolation.” Under this theory, the lack of social contact between blacks and whites and between classes “enhances the effects of living in a highly concentrated poverty area.” *Id.*

been framed as conservative by liberal thinkers. As Melvin Oliver and Thomas Shapiro and as Douglas Massey and Nancy Denton do, liberal thinkers perhaps focus less on individuals and more on social structural context. It is not that these liberal thinkers lack a familiarity with these so-called conservative approaches.⁴⁹ Rather, they find them less analytically tasty for the project that they undertake: *faulting* social structure (e.g., *white structural racism*).⁵⁰

By ignoring the degree to which race consciousness works intimately and interdependently with social structures, studies by sociologists like Melvin Oliver, Thomas Shapiro, Douglas Massey, and Nancy Denton miss the ultimate point. By focusing only on social structures as explanatory variables (e.g., *white structural racism*) for the persistent of poverty, we become fixated on raw data.⁵¹ We spend lots of time and money describing a world that could never exist without us. We may even look to political economy and the internationalization of domestic economies to explain structural shifts that deposit the respected poor permanently into the underclass. Unfortunately, these data, descriptions, and theories rarely if ever uncover profoundly new factors that might better explain why poverty persists. Any explanation, data, or description that ignores human agency and race consciousness must fail. Such meta-models hover over the problem, and at base the problem emanates from the manner in which we dream our possibilities. By focusing on social structures, we implicitly forgive the manner in which institutional forces (e.g., parents) convince citizens to accept limitation or to transcend astounding heights. By conjoining social structure and psychological factors in the co-creation and maintenance of poverty, we recognize that we can alter our reality, principally because reality pulses and

49. See, e.g., MASSEY & DENTON, *supra* note **, at 5-6 (discussing the poverty theories by Oscar Lewis, Daniel Patrick Moynihan, Edward Banfield, Charles Murray, and Lawrence Mead).

50. See JOE R. FEAGIN & HERNÁN VERA, *WHITE RACISM: THE BASICS* 16 (1995). In attributing most socio-psychological phenomena to white racism, Feagin and Hernán argue that:

Racism in thought and practice destroys the feelings of solidarity that people normally feel toward each other. A target of discrimination is no longer seen as "one of us." The other becomes less than human, a nonperson. White racism transforms the black self, the other-outsider into something less than the white self and reduces the black individual's humanity. Black individuals become "they" or "you people." Black men, women, and children become hated objects instead of subjects. White racism involves a massive breakdown of empathy, the human capacity to experience the feelings of members of an outgroup viewed as different. Racial hostility impedes the capacity to realize that "it could have been me."

Id.

51. Cf. Raymond S. Franklin, *White Uses of the Black Underclass*, in *A NEW INTRODUCTION TO POVERTY*, *supra* note 35, at 119, 136 ("'Hard' data suggest that the 'facts' of crime must be caused by the absence of 'mental' traits or enduring intergenerational 'cultural' transmissions; this, moreover, cannot be changed, even under favorable environmental conditions."); *id.* ("My point is that these are old beliefs dressed in new garb. There are other ways of presenting crime data that enhance our perspectives rather than feed our preexisting racial inclinations.") (citation omitted).

shifts constantly.⁵² Reality lives like virgin, unmolded clay, and in the hands of the skilled artist, reality flows from the minds of its handler. Poverty thus becomes an aspect of social reality and flows from social structures because the structures have achieved one or more of their explicit or implicit probable goals.⁵³ By assuming that social structures like the relatively autonomy of state can operate without us, we fatally and falsely assume that external, objective forces constructed poverty and then selected blacks, minorities, and women as necessary victims. By examining the interrelationship between social structure and human agency, sociologists can begin to ask different questions, *viz.*, *who co-creates poverty?*

In addressing *who co-creates poverty*, I posit a troubling, uncompromising premise. This premise grows out of an empowering philosophy. *We co-create our own personal worlds and manifold social realities.*⁵⁴ Based on this philosophy, every human being *is* a very powerful reality creator,⁵⁵ and this premise cognizes no *victimizer* or *victimized*.⁵⁶ As such, whites do not victimize

52. See generally I ROBERTS, *supra* note 15.

53. Cf. DAVID BOHM, WHOLENESS AND THE IMPLICATE ORDER 148-49 (1995). As the late quantum physicist David Bohm wrote,

Consider, for example, how on looking at the night sky, we are able to discern structures covering immense stretches of space and time, which are in some sense contained in the movements of light in the tiny space encompassed by the eye (and also how instruments, such as optical and radio telescopes, can discern more and more of this totality, contained in each region of space).

There is the germ of a new notion of order here. This order is not to be understood solely in terms of a regular arrangement of *objects* (e.g., in rows) or as a regular arrangement of *events* (e.g., in a series). Rather, a *total order* is contained, in some *implicit* sense, in each region of space and time.

Now, the world 'implicit' is based on the verb 'to implicate.' This means 'to fold inward' (as multiplication means 'folding many times'). So we may be led to explore the notion that in some sense each region contains a total structure 'enfolded' within it.

Id.

54. See, e.g., Barbara Marciniak, *Pleiadians Book: Sage of Family of Light* 3 (Sept. 11, 1991), (visited May 23, 2001), available at <http://www.spiritweb.com/Spirit/pleiadians-part13.html>. Marciniak writes: "Many of you have been practicing the art of projection. That means that you blame someone else for what you have created. That is acting completely against all that we have taught you. No one else does anything to you ever. *You create your reality*. In order for you to get the body ready to move into the multi-dimensional version of self, you must stop judging it." *Id.* (emphasis added).

55. See I WALSCH, *supra* note 13, at 103 ("Have I told you *all thought is creative?*").

56. *Id.* at 75. According to Walsch,

The promise of God is that you are His son. Her offspring. Its likeness. His equal.

Ah . . . here is where you get hung up. You can accept "His son," "offspring," "likeness," but you recoil at being called "His equal." It is too much to accept. Too much bigness, too much wonderment—too much *responsibility*. For if you are God's *equal*, that means nothing is being done *to* you—and all things are created *by* you.

blacks. Likewise, blacks do not victimize whites. Blacks, whites, and others embrace a "race-focused consciousness," and thus they lend their mental energies to poverty and residential segregation.⁵⁷ Once blacks, whites, and others have been steeped in the dominant social narrative, they work collectively, mostly unconsciously, to co-create poverty and residential segregation. In fact, the persistence of poverty and residential segregation depends on blacks, whites, and others thinking, talking, and acting in very narrow, limited, and disempowered ways.

Accordingly, we must vitiate and condemn words like *victims* and *victimization*. In this way, notwithstanding Massey and Denton's thesis, *white racism* cannot explain extant poverty and residential segregation.⁵⁸ By looking to white structural racism, by projecting our thinking, talking, and acting onto others, we absolve ourselves of the degree to which our inner consciousness fuels personal worlds and manifold social realities. In these worlds and realities, blacks, whites, and others expect to face poverty, wealth, and residential segregation, and by so expecting, they actively, even if a meditative unconscious narrative, co-create them. By rejecting concepts like victimizer and victimized, we can choose to acknowledge that we are *powerful reality creators*. As powerful reality creators, blacks play active, co-creative roles in why poverty and residential segregation persist, and therefore in addressing *who co-creates poverty*, we must ask why very powerful reality creators like blacks and whites believe that poverty and residential segregation serve the grandest vision of angelic humans?⁵⁹

Part I discusses and presents the foundational concepts on which these sociologists have premised *Black Wealth/White Wealth* and *American Apartheid*. Part II critically evaluates why these books rely heavily on social structure to explain the manner in which we have co-creatively racialized vast wealth, abject poverty, and racial segregation.⁶⁰ In so doing, *Black Wealth/White Wealth* and *American Apartheid* dismiss blacks from the race consciousness in which they must perform key players. As a corollary, we—all of us—can alter our personal

There can be no more victims and no more villains—only outcomes of your thought about a thing.

I tell you this: all you see in your world is the outcome of your idea about it.

Id. (emphasis in original).

57. See, e.g., SHELBY STEELE, *A DREAM DEFERRED* 3-4 (1998) ("[B]lack American leaders were practicing a politics that drew the group into a victim-focused racial identity that, in turn, stifled black advancement more than racism itself did.").

58. See generally MASSEY & DENTON, *supra* note **, at 1-16 (discussing and describing white racism as the missing link in the persistent of ghettos and the urban underclass).

59. See generally 3 CARROLL, *supra* note 7.

60. See, e.g., OLIVER & SHAPIRO, *supra* note *, at 68 ("[W]e contend that the buried fault line of the American social system is who owns financial wealth—and who does not. The existence of such a wealthy class ensures that no matter the skills and talents, the work ethic and character of its children, the latter will inherit wealth, property, position, and power.").

worlds and manifold social realities if we *choose* to do so.⁶¹ By looking to social structure (e.g., *white structural racism*) as a juggernaut over which our race consciousness has very little immediate influence, we must patiently await a *deus ex machina* to save us from the poverty and residential segregation that we co-created. We may lay blame at God's feet, but the dirty hand that does so belongs to us. Part III invites the reader to consider if a New Age critical legal theory can enable us to change poverty and residential segregation.

I. "EXTERNAL," OBJECTIVE STRUCTURAL REALITY: WHITE RACISM
AND THE PERSISTENCE OF POVERTY AND RESIDENTIAL SEGREGATION

A. *Introduction: Poverty and the Problem of Social Structure*

What is *poverty*? Is it material privations? Is it the absence of support, money, or goods? Does it connote that one lacks the material means for a proper existence?⁶² If so, what does "material" mean? What does "support" mean? How little "money" must I have? What too few "goods" amounts to an absence? What is a "proper existence"? To whom should we look for these terms' meaning? Assuming that we can garner clear, uncontested meanings, who should provide what "material" means? Should it be the state? Should it be subject citizens? Should we look to the "free" market? Can we combine these probable sources? And if so, does one carry more weight than others? If as classic liberalism would argue that the state exists to provide a safe public sphere in which citizens can maximize their private preferences, then can a citizen's wealth maximizing behavior become the predominant factor of an analysis of poverty?⁶³ By thinking of poverty as an effect of political economy,⁶⁴ are we suggesting that we can only understand poverty by looking to the state?

In *Black Wealth/White Wealth* and *American Apartheid*, both authors ignored *who* co-created poverty. Likewise, by glossing over the human source to poverty, liberals ignore the concomitant question: *who is the poor?*⁶⁵ Rather, they, like

61. See generally ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES* (1981).

62. See WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1127 (1994) (defining poverty).

63. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1965).

64. See, e.g., HENRY GEORGE, *PROGRESS AND POVERTY—THE REMEDY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH* (1898).

65. See KELSO, *supra* note 48, at 15 (In defining the poor, Mollie Orshansky of the Social Security Administration "argued that poverty was essentially a problem of absolute rather than relative deprivation. She believed that people should be considered poor if their income fell below some acceptable minimum dollar amount."); *id.* at 25-26 (In defining the underclass, and while noting that the underclass constitutes a heterogeneous group, "all commentators agree that if there is any one trait that seems to characterize the underclass it is their unwillingness to flout the traditional norms of what society generally considers acceptable behavior. . . . Similarly, the public

other scholars⁶⁶ looked to “external,” objective reality, *viz.*, the state. By emphasizing the state’s role as if *Structure* existed independently from the manner in which we collectively think,⁶⁷ these scholars have missed the larger point.⁶⁸ Nevertheless, the state has played, and continues to play, a vital but non-exclusive role in the persistence of poverty. By state, I mean social structure, which in part means the manner in which social systems distribute resources like wealth, income, and property.

In *Black Wealth/White Wealth*, Melvin Oliver and Thomas Shapiro defined poverty by looking to racialized material inequality, and for these scholars, racialized material inequality originated in “external,” objective reality. They began by defining wealth and income. Wealth meant an individual’s and family’s access to life chances. Wealth constituted “a stock of assets owned at a particular time. Wealth is what people own.” Wealth indicates a family’s “command over financial resources that [the family] has accumulated over its lifetime along with those resources that have been inherited across generations.”⁶⁹ Wealth embraced two concepts: *net worth* and *net financial assets*. Net worth represented a complete inventory of all assets less debts. Net financial assets meant the “flow of money over time.” Income referred to a person’s wages, retirement, and social welfare. Wealth and income conjoined to

often finds the underclass to be strangers [alluding to Albert Camus’ existential work, *The Stranger* in the sense that they are at a loss for explaining their often self-destructive behavior.”).

66. See, e.g., Michael B. Katz, *Race, Poverty, and Welfare: Du Bois’s Legacy for Policy*, 568 ANNALS 111 (2000).

67. See Rainwater, *supra* note 39, at 11. Rainwater correctly argues:

In fact, one of the most interesting sources of latent patterns should be in the gap between the publicly accepted Theory and the actual structure found by an observer. The Theory generates as its main result an object of public definition which we have called a “way of life,” but which might be called in a more abstract vein the Theoretical structure, or even the ideal structure . . . [I]t will be called the Structure.

Id.

68. See Anthony Giddens, *A Reply to My Critics*, in SOCIAL THEORY OF MODERN SOCIETIES: ANTHONY GIDDENS AND HIS CRITICS 249, 256 (David Held & John B. Thompson eds., 1989) [hereinafter cited as Giddens, *A Reply*]. On the issue of whether social structure operates outside of human agency, Anthony Giddens aptly writes:

In criticizing my viewpoint, [Zygmunt] Bauman and [John] Thompson, in somewhat varying ways, pose the question: “what are the rules which *comprise* social structure?”; but this is not a question which makes any sense in terms of the notion I have proposed. I usually avoid using the term “social” structure, because this conforms too closely to a position I want to avoid, in terms of which structure appears as something “outside”, or “external”, to human action. In my usage, structure is what gives *form* and *shape* to social life, but it is not *itself* that form and shape – nor should “give” be understood in an active sense here, because structure only exists in and through the activities of human agents.

Id.

69. OLIVER & SHAPIRO, *supra* note *, at 2.

create opportunities to “secure the ‘good life’ in whatever form is needed—education, business, training, justice, health, comfort, and so on.”⁷⁰ At base, Oliver and Shapiro defined wealth and income in this manner not only because they focused on racialized material inequality or poverty, but also because they placed wealth accumulation in its *historic* context.⁷¹ In brief, *Black Wealth/White Wealth* examined that manner in which America’s social systems predicated wealth accumulation on racialized material inequality (or black poverty).⁷²

In *Black Wealth/White Wealth*, state policies and white supremacy operated as “external,” objective reality, and in order to show why racialized material inequality (i.e., racialized poverty) originated out of a larger, dominant social narrative, one that still bears out present-day effects, Oliver and Shapiro analyzed wealth accumulation in the three contexts: racialization of state policy, economic detour, and sedimentations of racial inequality.⁷³ By looking at racialized material inequality in this context, they posited that wealth inequality flowed not only from sedimentation, but also from failed black entrepreneurship. This sedimentation and failure were birthed by state-sanctioned policies that favored white over black. In this way, these three contexts underwrote wealth inequality as officially sanctioned racialized state policies. Regardless of black-white inequality, these policies concentrated vast wealth in very small numbers. Ultimately, Oliver and Shapiro asserted forcefully that we must appreciate how wealth inequality created two worlds,⁷⁴ and without specific policies that will help blacks, that create asset accumulation opportunities, and that secure racial equality, we may face heightened conflict and social violence.⁷⁵

In *American Apartheid*, Douglas S. Massey and Nancy A. Denton also focused on “external,” objective reality when they studied poverty (i.e., the black

70. *Id.*

71. *Id.*

72. See Valerie Polakow, *Savage Distributions: Welfare Myths and Daily Lives*, in A NEW INTRODUCTION TO POVERTY, *supra* note 35, at 241, 242-43. Polakow writes:

In 1993, 14.6 million children lived in poverty in the United States—nearly 9 million white children, 4.9 million black children, and 3.1 million Latino children, according to the Children’s Defense Fund. Although there are more white children actually living in poverty, the child poverty rates are far higher for children of color (46.6 percent for black children, 39.9 percent for Latino children, who may be of any race, and 16.9 percent for white children).

Id.

73. OLIVER & SHAPIRO, *supra* note *, at 3-5.

74. *Id.* at 3-5.

75. *Id.* at 10 (“We can choose to let racial inequality fester and risk heightened conflict and violence. Americans can also make a different choice, a commitment to equality and to closing the gap as much as possible.”); MASSEY & DENTON, *supra* note **, at 235-36 (“If segregation is permitted to continue, poverty will inevitably deepen and become more persistent within a large share of the black community, crime and drugs will become more firmly rooted, and social institutions will fragment further under the weight of deteriorating conditions.”).

underclass). Like Oliver and Shapiro, they looked to social structure—*white racism and prejudice*. Consider the Kerner Commission's conclusion, which Massey and Denton cited favorably: "white society is deeply implicated in the ghetto. White institutions created it, white institutions maintained it, and white society condones it."⁷⁶ In this way, black underclass life originated not necessarily from a culture of poverty,⁷⁷ but more than likely from structural mechanisms like residential segregation (e.g., "social isolation").⁷⁸ Put more emphatically, Massey and Denton assert that "[r]esidential segregation is the institutional apparatus that supports other racially discriminatory processes and binds them together into a coherent and uniquely effective system of racial subordination."⁷⁹ At base, without residential segregation, we would not have black ghettos. As a social system, residential segregation forms an American organizing principle that creates the urban underclass.⁸⁰

In *Black Wealth/White Wealth* and *American Apartheid*, neither author treated poverty and the black underclass as jurisprudential or theoretical questions. They did not ask broad questions: "What is poverty?" or "Who creates poverty?" Rather, they addressed: "*Why* racialized material inequality?", and "*Why* the rise and continuance of the black underclass?"⁸¹ Unfortunately, *Black Wealth/White Wealth* and *American Apartheid* overlooked human agency.⁸² They implicitly rejected any notion that race consciousness fueled racialized wealth inequality and residential segregation. As a result, we must peer into the confined spaces between the data on which sociological treatments of poverty have relied to find different answers, while avoiding the narrow arguments that focus on morality, family structure, genetics, and social welfare policies.⁸³ By relegating dominant social structures *and* race consciousness to either conservatives or to non-traditional approaches, *Black Wealth/White Wealth* and *American Apartheid* more than suggest that "external," objective reality like white supremacy or white prejudice served as a better way to explain the persistence of racialized wealth inequality and the black underclass. In so doing, *Black Wealth/White Wealth* and *American Apartheid* constructed poverty so that

76. MASSEY & DENTON, *supra* note **, at 4.

77. *Id.* at 3-5.

78. See Wilson, *supra* note 48, at 16 ("'[S]ocial isolation' does not mean cultural traits are irrelevant in understanding behavior in highly concentrated poverty areas. Rather it highlights the fact that culture is a response to social structural constraints and opportunities.").

79. MASSEY & DENTON, *supra* note **, at 8.

80. *Id.* at 9.

81. *Id.*

82. See Giddens, *A Reply*, *supra* note 68, at 256. Giddens, in arguing in favor of accounting for human agency, writes: "'Structure' has no descriptive qualities of its own as a feature of social life, because it exists only in a virtual way, as memory traces and as the instantiation of rules in the situated activities of agents. . . . The structural properties of social systems, however, are not themselves rules, and cannot be studied as rules." *Id.*

83. See generally Gilder, *supra* note 47.

we continually avoid asking different, difficult questions,⁸⁴ inquiries that would invite all of us to acknowledge that poverty exists because we believe in wealth and poverty and because we believe a maldistribution of wealth so long as we garner our personal chance to get rich.

Although these scholars avoid questions that I find more compelling, *Black Wealth/White Wealth* and *American Apartheid* broaden our horizons on poverty and residential segregation. While not jurisprudential, these scholars seek out the etiology of racialized material inequality (i.e., poverty) and the black underclass (i.e., urban poverty and residential segregation). Thus, when we consider both books, we must conclude that *Black Wealth/White Wealth* and *American Apartheid* occupy a special place in the sociological literature. Due to their clarity of insight, their judicious use of data, and their narrative force, these books should shift the manner in which we have traditionally discussed poverty and the black underclass, thus giving us a new way to understand persistent social problems—wealth inequality and residential segregation.

In so doing, Oliver and Shapiro in *Black Wealth/White Wealth* and Massey and Denton in *American Apartheid* offer us a soberly woeful sociological tale. It suggests that our laws may be insufficient.⁸⁵ At present, federal statutes and court rulings have barred many discriminatory practices.⁸⁶ Yet, Oliver and Shapiro illustrate how state-sponsored policies of racialized inequality and its resulting sedimentation of inequality will at this juncture persist even if we completely abandoned our conscious or unconscious racist practices.⁸⁷ Equally important, Massey and Denton reveal that racial segregation, the key to racialized isolation for urban blacks, will persist because whites self-consciously engage in practices that not only frustrate integration, but also make hypersegregation a social reality.⁸⁸ In *Black Wealth/White Wealth*, Oliver and Shapiro have clear goals. They wish to help blacks. They wish to encourage policies that promote asset accumulation opportunities at society's bottom. Ultimately, they wish to secure broad racial equality in the Twenty-first Century.⁸⁹ In *American Apartheid*, Massey and Denton urge us not only to commit to end black ghettos, all of which symbolize the effect of racial oppression, but also to better enforce the Fair Housing Act and to prosecute white racists vigorously when they harass

84. For legal literature on the social construction of gender, sexual identity, and disability, see NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* (1998); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999); Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201 (1990).

85. See, e.g., *United States v. McInnis*, 976 F.2d 1226 (9th Cir. 1992).

86. See, e.g., *Latimore v. Citibank, F.S.B.*, 979 F. Supp. 662 (N.D. Ill. 1997) (finding that plaintiff failed to make out a prima facie case of lending discriminatory based on a real estate appraisal that allegedly controlled for the racial composition of the neighborhood regardless of the favorable comparables).

87. See OLIVER & SHAPIRO, *supra* note *, at 37-42.

88. See MASSEY & DENTON, *supra* note **, at 10-11.

89. See OLIVER & SHAPIRO, *supra* note *, at 9.

and intimidate blacks.⁹⁰

In reviewing these books, I evaluate them separately, principally because while they both ultimately study poverty, each book has a different analytical focus. After this separate evaluation, I critically argue what I think is the central difficulty with *Black Wealth/White Wealth* and *American Apartheid*. That is, poverty and the underclass originate from social structures and institutional practices, and these structures and practices exist in an "external," objective reality over which the people, regardless of race, unless the person happens to be relatively rich and powerful, have little or no control. Without meaningful power, people, especially the poor, suffer constraints, all of which have their operating source outside of a poor person's purview. As a result, the poor live without meaningful choices, and without choices, the poor cannot attain equal opportunities not only for asset accumulation, but also for upward economic mobility. In all of these structures and practices, neither sociologists' accounts for human agency, for the role of race consciousness, or for meaningful thinking, talking, acting that informs, shapes, and influences not only what a person may expect to experience, but also how she experiences the reality that only she can absolutely co-create. Notwithstanding my critique, I endorse both books' sociological mission and their aspirational goals for racial equality.⁹¹

In the end, these scholars essentially posited that poverty originated from "external," objective reality (i.e., social structural policies). In so doing, they placed poverty beyond our personal control and outside of our human agency. By illustrating how thinking and experience are inextricably linked, *Black Wealth/White Wealth* and *American Apartheid* continue to construct poverty as traditional sociological treatments of poverty have done in the past. Unfortunately, we remain unaware that we co-create personal worlds and social realities in which we victimized ourselves unwittingly, not violently with the proverbial gun, but perennially with our minds.

B. Black Wealth/White Wealth: State-Sponsored Racialized Wealth Inequality

1. *The Centrality of Wealth over Income.*—In *Black Wealth/White Wealth*, Oliver and Shapiro clearly argue that black wealth inequality originates in American Negro Slavery. It was in this state-sponsored institution that blacks were exploited by the state and white masters not only for their labor, but also for wealth maximization. After slavery, blacks fared little better, moving from *de jure* enslavement to *de facto* discrimination. Reconstruction relieved some of the odious black suffering, but it did not effectively end this inequality. At Reconstruction's demise, a Jim Crow world, backed by the state, denied blacks equal treatment, trapping them in poverty. In addition to poverty, blacks had

90. See MASSEY & DENTON, *supra* note **, at 217-18.

91. See generally Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69 (1995).

fewer opportunities than whites. It is not just the absence of social and economic opportunities. Rather, it is the amassed wealth that whites acquired. During the Jim Crow era, blacks could not have had equal asset accumulation opportunities.

With the aid of the Fair Housing Administration, the HOLC, and financial institutions, whites acquired wealth producing assets like real property, and at the same time, these federal agencies worked purposely to prevent blacks for living in white neighborhoods. By not owning homes with equity, blacks were negatively impacted. They could not use their homes to accumulate wealth. Even if blacks owned homes, they could not maintain the home's fair market value and equity if banks refused to lend them money, especially for basic upkeep and major improvements. And when banks did lend, they practiced reverse redlining, forcing blacks to borrow at almost usurious rates from second and tertiary lending markets. When they could not afford to pay, banks foreclosed, forcing blacks to losing what asset accumulation could have been gained by leveraging their homes. In the end, Oliver and Shapiro posited that it is racialized state policies that permitted not all citizens but whites to maximize their wealth.⁹²

By looking critically at slavery, white suburbs, and institutionalize racism in the banking industry,⁹³ Oliver and Shapiro simply began to make clear their focus: the fundamental material aspect of inequality.⁹⁴ It is not the story that blacks have not materially improved. Since 1930 to early 1970s, blacks have made material gains. Civil rights also ushered in the end of legal segregation, and as a result, blacks did improve their social station. Blacks also began to graduate for high school at the same rate as whites. Blacks and whites shared similar rates of attending college. However, since the mid-1970s, black college enrollment declined.⁹⁵ This decline correlated with 1970s economic shift, a recession that impacted blacks harder than whites. This impact difference revealed the value of Oliver and Shapiro's wealth focus. Since the 1970s, black economic gains have either deteriorated or stagnated. In addition to falling behind white wealth accumulation, blacks still suffered higher unemployment and residential segregation. Even if blacks had achieved income parity with whites, they tended to live in overcrowded and substandard housing. These persistent material differences move Oliver and Shapiro to conclude that *full equality* did not exist between blacks and whites.⁹⁶

In *Black Wealth/White Wealth*, Oliver and Shapiro mandated that full equality must mean wealth equality. Full equality would help blacks; it would promote equal asset accumulation opportunity for this nation's bottom, no doubt including poor blacks, whites, and others.⁹⁷ Without full material equality, blacks suffered wealth decline at steeper rates than whites. Since the mid-

92. See OLIVER & SHAPIRO, *supra* note *, at 1-21.

93. See *id.* at 13-21.

94. See *id.* at 23.

95. *Id.* at 23-24.

96. *Id.* at 24-25.

97. *Id.* at 9.

1970s, the story has been bleak for blacks. Prior to this period, blacks were wage earners, but they simply were not accumulating wealth but earning incomes. And while they could escape some of the worst aspect of urban poverty, they still depended mainly on wage income. Accordingly, since the mid-1970s, with corporations coping with a slowing world economy and seeking to cut production costs, blacks faced slow wage growth and growing inequality between them and whites. In addition to slowing wage growth, young black men lost their jobs at a rate greater than young white men. As a result of this economic recession, the material inequality between blacks and whites increased, allowing the rich to reconcentrated wealth. During this period, the income gap between blacks and whites increased. In addition, the state cut social programs, truly hurting the already economically disadvantaged at society's bottom. For Oliver and Shapiro, this labor market and wage inequality cannot be explained by traditional culture of poverty argument, in which natural difference account for poverty.⁹⁸ They also did not truly embrace the idea that the current welfare state can redress this inequality.⁹⁹ Regardless, since the mid-1970s, a weak economy exposed the core effect of racialized state policies—the growing gap in black and white material inequality.

Given the history of racialized state policies, Oliver and Shapiro recognize that income studies will not enable us to promote full wealth equality between black and white families.¹⁰⁰ First, wages and salaries do not perforce become immediate wealth. Rather, they can create opportunities for asset accumulation.¹⁰¹ For one reason, the top twenty percent received forty-three percent of all income, and the nation's poorest one-fifth earned about four percent of the total income.¹⁰² Traditionally, sociologists and economists have studied income when they wanted to measure well-being, social justice, and equality.¹⁰³ Although income has been historically unequally distributed, wealth has been an even more unevenly distributed resource. Thus, we arrive at *Black Wealth/White Wealth's* analytical focal point—wealth. In studying wealth, Oliver and Shapiro wished to show that not income but wealth created and reinforced early racialized state policies,¹⁰⁴ approaches that we designed to benefit whites and to keep blacks economically dependent and financially impoverished.¹⁰⁵

98. *Id.* at 26-28.

99. See George, *supra* note 40, at 197-98.

100. See DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 118 (1999) ("Given that the large differences in net worth by race appear to overlay onto wealth disparities by family type, it is reasonable to suspect that assets may be playing a causal role in generating black-white differences in family structure.").

101. OLIVER & SHAPIRO, *supra* note *, at 31.

102. See *id.* at 29.

103. See *id.* at 29-30.

104. See *id.* at 37-45.

105. See *id.* at 176 ("The shadow of race falls darkly, however, on the black underclass, whose members find themselves at the bottom of the economic hierarchy.").

By starting with racialized state policies, Oliver and Shapiro linked wealth to this nation's historical economic oppression of blacks and other racial minorities. In this regard, it would appear that Oliver and Shapiro's *Black Wealth/White Wealth* served as an excellent precursor to a reasonably palatable reparations argument.¹⁰⁶ Beyond this point, wealth and income differ. Wealth meant a person's total accumulated assets and access to resources. Wealth also referred to a person's net value of assets, viz., real estate, minus debt held at one time. Fundamentally, wealth meant real or intangible asset of economic value that can be brought, sold, traded, or invested, a thing that carried an economic return. Income meant the flow of money like salaries and wages over a set period, typically one year.¹⁰⁷ Given this difference, Oliver and Shapiro proffered three criticisms of income. First, only a presumed relationship existed between income and wealth. Second, without data on wealth, income cannot reveal the inequality of life chances between blacks and whites. Third, we can get wealth data, and so we do not have to rely on income distributions. By looking beyond income so that we can truly appreciate the degree to which racialized state policies have benefitted whites, Oliver and Shapiro examined the implications of studying wealth. While income allowed a person to manage day-to-day needs, wealth granted a person not only income but also power, leisure, and independence. While income has become an outgrowth of wealth so that a person may invest in commercial and industrial ventures, wealth conferred power on its owner,¹⁰⁸ and with wealth, one could transfer assets from generation to generation.¹⁰⁹ This intergenerational transfer can ensure "economic outpatient care"¹¹⁰ to beneficiaries and devisees.

106. See *id.* at 178 (suggesting that reparations talk following naturally as a "wholly defensible strategy" for dealing with racialized wealth inequality, especially because this inequality originates in the racialization of state policy that centered in and around slavery and Jim Crow practices). The authors state:

Given the historical nature of wealth, monetary reparations are, in our view, an appropriate way of addressing the issue of racial inequality. . . . This initial inequality has been aggravated during each new generation, as the artificial head start accorded to practically all whites has been reinforced by racialized state policy and economic disadvantages to which only blacks have been subject. We can trace the sedimented material inequality that now confronts us directly to this opprobrious past. Reparations would represent both a practical and a moral approach to the issue of racial injustice.

Id. at 88. See also RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998).

107. See OLIVER & SHAPIRO, *supra* note *, at 30.

108. STANLEY & DANKO, *supra* note 36, at 2 ("Wealth is not the same as income. If you make a good income each year and spend it all, you are not getting wealthier. You are just living high. Wealth is what you accumulate, not what you spend.").

109. OLIVER & SHAPIRO, *supra* note *, at 32, 67-90.

110. See generally STANLEY & DANKO, *supra* note 36, at 175-219 (defining "economic outpatient care" as intergenerational economic assistance from parents to children or beyond, and

2. *Racialization of State Policy and Wealth Inequality*.—Even if the state endorsed American Negro slavery and underwrote Jim Crow politics, how do we explain current disparity in wealth accumulation between blacks and whites? In address this question, Oliver and Shapiro critiqued “sedimentation of inequality” and “economic detour.” As in the foregoing section, Oliver and Shapiro focused on social systems, ones that favored whites over blacks, ones in which whites easily retreated to violence, ones from which blacks lacked sufficient means of escape. Alas, dominant social narrative not only determined historical movement, but also dictated an end from well-drawn beginning.¹¹¹

Do slavery’s economic privations and Jim Crow’s institutional racism explains material equality between blacks and whites? In *Black Wealth/White Wealth*, Oliver and Shapiro must address this question, and they do. They must do so, especially if they advocated material equality. After reading this book, I suspect that it served as a vanguard to a complex race/class analysis to reparations talk.¹¹² Anyway, by focusing on wealth, we can appreciate not only racialized state policies that gave advantages to whites, but also placed this wealth advantage in historical context. In this context, we can account for race, class, and other historical factors, and in so doing, we avoid limiting our focus on race or class. According to Oliver and Shapiro, race and class alone cannot explain why whites have amassed more material wealth than blacks. By looking to wealth as the predominant methodological vehicle for explaining wealth inequality, Oliver and Shapiro targeted the source of racial inequality. With wealth as their focal point, we can conclude that historical and structural factors accounted for this wealth inequality between blacks and whites.¹¹³

Given the racialized state policies that involved not only slavery and Jim Crow politics, but also white prejudice and racial segregation, what currently

positing that most ordinary citizens who become millionaires do not receive intergenerational assistance).

111. See Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 14, 19 (Peter Brooks & Paul Gewirtz eds., 1996) (“For our literary sense of how stories go together—of their beginnings, middles, and ends—may govern life as well as literature more than [Alan Dershowitz] is willing to allow.”).

112. See OLIVER & SHAPIRO, *supra* note *, at 176. Oliver and Shapiro revealed this complexity of race and class when they argued:

[O]ur investigation of wealth has revealed deeper, historically rooted economic cleavages between the races than were previously believed to exist. The interaction of race and class in the wealth accumulation process is clear. Historical practices, racist in their essence, have produced class hierarchies that, on the contemporary scene, reproduce wealth inequality. As important, contemporary racial disadvantages deprive those in the black middle class from building their wealth assets at the same pace as similarly situated white Americans. The shadow of race falls most darkly, however, on the black underclass, whose members find themselves at the bottom of the economic hierarchy.

Id.

113. See *id.* at 33-36, 127-70.

explains the material inequality between blacks and whites? Traditionally, one could argue that socioeconomic factors like age, education, and income could account for this material difference. Yet, Oliver and Shapiro disagreed. They relied on SIPP wealth data, and after standardizing the data into four categories and after eliminating households headed by those under age sixty-five, they reached one conclusion: black and white income differences were insufficient to “explain the large racial wealth gap.”¹¹⁴ Moreover, when blacks have incomes and wealth near whites, they have less than one-half the net worth and net financial assets of whites. As Oliver and Shapiro argued, blacks and whites “with equal incomes possess very unequal shares of wealth. More so than income, wealth holding remains very sensitive to the historically sedimenting effects of race.”¹¹⁵

3. *Economic Detour*.—America frustrated black entrepreneurship,¹¹⁶ especially because private economic enterprises would threat existing white interest. States adopted policies that created hostile economic climes in which blacks had to grow their business, and by which blacks sought to survive and feed their families.¹¹⁷ Thus, state policies that barred blacks from lucrative markets, even though black businesses tried to provide services and goods comparable to larger markets against which they were required to compete for black consumers. With these barriers, blacks were required to take an “economic detour.” Based on Merah Stuart’s 1940 work, he defined “economic detour.”

This [exclusion from the market] is not his preference. Yet it seems to be his only recourse. It is an economic detour which no other racial group in this country is required to travel. Any type of foreigner, Oriental or “what not,” can usually attract to his business a surviving degree of patronage of the native American. No matter that he may be fresh from foreign shores with no contribution to the national welfare of his credit; no matter that he sends every dollar of his American-earned profit back to his foreign home . . . yet he can find a welcome place on the economic Broadway to America.¹¹⁸

According to Oliver and Shapiro, “[r]acist state policy, Jim Crow segregation, discrimination, and violence have punctuated black entrepreneurial efforts of all kinds. Blacks have faced levels of hardship in their pursuit of self-employment that have never been experienced as fully by or applied as consistently to other ethnic groups, even other nonwhite ethnics.”¹¹⁹ For

114. *Id.* at 100-01.

115. *Id.* at 101.

116. *See id.* at 45 (“In American society one of the most celebrated paths to economic self-sufficiency, both in reality and in myth, has been self-employment.”).

117. *See id.* at 4-5. “When businesses were developed that competed in size and scope with white businesses, intimidation and ultimately, in some cases, violence were used to curtail their expansion or get rid of them altogether.” *Id.* at 5.

118. *Id.* at 46-47.

119. *Id.* at 45.

example, in the *Red Record*, Ida B. Wells Barnett chronicled how blacks were lynched after they opened a general goods store across the street from a white stores. Within no time, they prospered, and rather than compete more efficiently, whites used trumped charges and a charged moment to gun down the three black male owners.¹²⁰ This postbellum era tale typified how black self-employment faced hurdles well into the 1900s.¹²¹ In recent years, scholars have expressed renew interest in the Tulsa, Oklahoma's Black Wall Street,¹²² the Greenwood residential and commercial district that whites destroyed based on the flimsiest tale that a black man had attacked a white woman.¹²³ Given the Jim Crow era in which these ugly tales of white racial violence took place, it must be understood that official state policies created hostile business environments for black self-employment. They had to serve black markets. By restricting access to mainstream markets, a denial that the state did not foist on whites and other ethnic groups,¹²⁴ black entrepreneurs had to settle for minorities markets that had limited by size and resources. By restricting the degree to which black businesses could expand and by constricting the financial stream into these businesses, the state effectively limited "the wealth-accumulating ability of African Americans."¹²⁵

For Oliver and Shapiro, we have the wrong image of black self-employment, principally because racialized state policies and because successful ethnic immigrants. Despite the racialization of state policies, blacks historically have pursued self-employment, the road to economic independence and self-sufficiency. In fact, they worked like any other immigrant groups. Yet, notwithstanding the hostility that they faced, immigrant groups were still accorded better economic treatment than blacks by whites. In the traditional literature, white scholars have looked favorably at Jewish and Japanese immigrants, treating them as successful ethnic entrepreneurs. In this literature,

120. See OLIVER & SHAPIRO, *supra* note *, at 49 ("Black business success in [Wilmington and Tulsa] both threatened white business competitors and provoked racial fears of poor whites."); IDA B. WELLS-BARNETT, *ON LYNCHINGS* (August Meier ed., 1969).

121. See OLIVER & SHAPIRO, *supra* note *, at 4.

122. See *id.* at 49.

123. See *id.* at 50.

124. See OLIVER & SHAPIRO, *supra* note *, at 46. Oliver and Shapiro effectively point out that: Immigrant groups like the Japanese in California and the Chinese in Mississippi responded to the societal hostility (e.g., discrimination) against them by immersing themselves in small business enterprises. But unlike blacks, as John Butler states in his *Entrepreneurship and Self-Help Among Black Americans*, "they were able to enter the open market and compete." They faced few restrictions to commerce. They could penetrate as much of a market as their economic capacity and tolerance for risk could accommodate. They thus carved comfortable economic niches and were able to succeed, albeit on a moderate scale.

Id.

125. *Id.* at 5.

these positive ethnics have been juxtaposed against black failure.¹²⁶ The literature treats blacks as “socially deficient and constitutionally impaired when it comes to creating flourishing businesses.” Now, native blacks fare poorly against new arriving immigrants from Cuba, Jamaica, and Korea.¹²⁷

Notwithstanding these comparisons and the misunderstood history of black self-employment, Oliver and Shapiro tied any spotty track record to racialized state policies.¹²⁸ First, they pointed out that blacks have succeeded despite such policies. They illustrated this success by looking to Philadelphia and Cincinnati. “In 1840 half of Cincinnati’s black population were freedmen who had begun acquiring property and building businesses. By 1852 they held a half million dollars worth of property.”¹²⁹ Second, black also created capital formation opportunities. They formed mutual aid societies and “an independent black banking system.” Unfortunately, these antebellum wealth-creating opportunities suffered as “economic detour” arrived, producing laws that frustrated black investment opportunities, that denied blacks access to the stock market, and that prevented blacks and former slaves from practicing their artisan skills as a trade.¹³⁰ Nevertheless, between 1867 to 1917, blacks still pursued self-employment, even though they were relegated to providing goods and services to an all black clientele.¹³¹ In the 1940s, blacks prospered commercially and financially in Durham, North Carolina.¹³² Whether the spotty success of black businesses, they threatened whites, and invariably racial conflict destroyed early foundations for wealth accumulation. After the Wilmington Riots of 1898 and the Tulsa Riots of 1921, white businesses filled the commercial void, effectively benefitting from racialized state policies that encouraged not only violence and massacre, but also market restrictions and legal constraints. In the end, Oliver and Shapiro would correctly argue that deeply rooted (or sedimented) racial ignorance, fear, and hatred undermined black self-employment by detouring them from lucrative mainstream markets and from equal wealth maximizing opportunities.

4. *Sedimentation of Wealth Inequality*.—For Oliver and Shapiro, sedimentation of inequality analytically grounded their claim that blacks cannot reach material parity with whites. As such, it is not enough that Oliver and Shapiro clearly showed that the middle class and the wage earning class possessed vastly different amounts of material wealth.¹³³ For example, they

126. *But see, e.g.*, KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* (1999).

127. *See, e.g.*, MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* (1999).

128. OLIVER & SHAPIRO, *supra* note *, at 48 (“The overwhelming odds that black business owners faced render all the more resounding the victories that they were able to achieve.”).

129. *Id.* at 47.

130. *Id.* at 48.

131. *See id.*

132. *See id.* at 49.

133. *See id.* at 67-90.

stated that the "top 1 percent of America's families control two-thirds of the wealth. The top 1 percent collected over 4 times their proportionate share of income, but hold over 11 times their share of net worth and over 11 times their share of the net financial assets."¹³⁴ Although it is not clear why Oliver and Shapiro used "their share," it is clear that the middle class lacked the same financial assets of the elite economic cohort.¹³⁵ They must also then argue that despite this very precarious state of the middle class, the wealth difference between blacks and whites was staggering. They did, and it was a tale of two nations, one in which the black middle class rested on an economic footing that was precarious, marginal, and fragile.¹³⁶ This poor economic footing depended not on financial assets but on income. As such, the black middle class's net worth rested on home equity because the income-dependent and white-collar middle class only controlled petty financial assets (e.g., a car). "Without wealth reserves, especially liquid assets, the black middle class depends on income for its standard of living. Without the asset pillar, in particular, income and job security shoulder a greater part of the burden."¹³⁷ It was the white-collar occupations that disclosed real inequality. The "black middle class owns fifteen cents for every dollar owned by the white middle class."¹³⁸ Owing to this difference, whites can survive longer with a sudden income lost.¹³⁹ Although 1984 blacks owned three percent of all the accumulated wealth and received 7.6 percent of the total money earned, making up eleven percent of the households, the black-white wealth inequality still remained.¹⁴⁰

Can sedimentation of inequality explain this wealth gap? If we would begin with slavery and Jim Crow politics, Oliver and Shapiro contended that blacks cannot close this wealth gap. This inequality sediment carried with it a cumulative effect. It cemented blacks at our society's material bottom. They

134. *Id.* at 68-69.

135. *Id.* at 70. Of the three middle-class groups, income-determined, college-educated, and occupationally-defined, Oliver and Shapiro argue that:

[T]he income-determined middle class possesses \$39,700 in net worth and \$5,399 in net financial assets. It also surveys the capacity of net financial reserves to support (1) present middle-class living standards and (2) poverty living standards. In the event of a financial nightmare in which incomes were suddenly shut off, families in the income-defined middle class could support their present living standards out of existing financial resources for only two months. They could endure at the poverty level [of \$968.00 per month] for 5.6 months.

Id.

136. *See id.* at 92-93.

137. *Id.* at 95.

138. *Id.* According to Oliver and Shapiro, "[w]hen one defines the middle class as those with college degrees, the most numerically restrictive definition, one finds that the white middle class commands \$19,000 more [net financial assets]; using the broadest definition, white-collar occupations, the white middle class controls nearly \$12,000 more." *Id.*

139. *See id.* at 97.

140. *See id.* at 97-98.

argued: "Wealth is one indicator of material disparity that captures the historical legacy of low wages, personal and organizational discrimination, and institutional racism."¹⁴¹ Best efforts notwithstanding, black wealth inequality represented the present-effects of historic black oppression. Even when blacks attempted to work as entrepreneur, whites used intimidation, violence, and the law to deny them access to mainstream markets, the income source on which immigrant classes have depended.¹⁴² In this way, whites denied black capital formation on which a prosperous black middle could have been built.¹⁴³ More than organized violence, sediment inequality structurally advantaged whites over blacks. For example, in the 1940, the Federal Housing Administration ("FHA") privileged white home owning interest in a way that relegated, as Massey and Denton point out, blacks to urban ghettos. Oliver and Shapiro described the consequential inequality of sediment wealth: the "postwar generation of whites whose parents gained a foothold in the housing market through the FHA will harvest a bounteous inheritance in the years to come."¹⁴⁴

Coupled with intergenerational asset transfers and the re-concentration of wealth in the 1980s, sediment inequality will remain a damaging, if not a lagging, element for wealth equality between blacks and whites. Slavery denied blacks any right to control their economic destiny. Jim Crow vanquished any hope raised by the post-Civil War Amendments that blacks could rely on legal equality, self-help, and entrepreneurial ingenuity to accumulate financial assets. Beginning in the 1940s, the FHA, HOLC, and financial institutions worked collectively to institutionalize not only white privilege but also racialized net worth and net financial assets.¹⁴⁵ Organized violence gave effect to other tools like restrictive covenants and associations that could not get blacks out of traditionally all-white neighborhoods. With the Internal Revenue Code, whites could exploit equity, a liquidity that they could use to ensure educational opportunities for their children.¹⁴⁶ Given this wealth advantage, whites could much more easily survive the economic contraction of the mid-1970s. In the

141. *Id.* at 5.

142. *See id.* at 45-50.

143. *See id.* at 47-48.

144. *Id.* at 49-50.

145. *See id.* at 136-47 (discussing the continuing problem of lending discrimination, interest rate differentials based on race, credit worthiness, and home equity appreciation disparity based on neighborhoods and race).

146. *Id.* at 153. Oliver and Shapiro observed:

Wealth used thus to enhance a child's "cultural capital" helps provide a good start in life and can lay a good deal of the groundwork for financial success and independence later on. People often told us about the schooling, weeks at camp, after-school classes and sport, trips, and other experiences that they had enjoyed as kids and wanted to provide for their children. All parents pass along cultural capital to their offspring. Of the common enrichment that parents can provide, education is the most expensive, and it is where we found the most differences.

Id.

1960s and later, blacks who needed additional support relied on social welfare, and in order for blacks to qualify as the deserving poor, AFDC (Aid for Dependents with Children) required that blacks deplete their assets (e.g., savings). For Oliver and Shapiro, four factors linked racialized state policies and sedimentation of wealth inequality.

From the era of slavery on through the failure of the freedman to gain land and the Jim Crow laws that restricted black entrepreneurs, opportunity structures for asset accumulation rewarded whites and penalized blacks. FHA policies then thwarted black attempts to get in on the ground floor of home ownership, and segregation limited their ability to take advantage of the massive equity build-up that whites have benefited from in the housing market. As we have also seen, the formal rules of government programs like social security and AFDC have had discriminatory impacts on black Americans. And finally, the U.S. tax code has systematically privileged whites and those with assets over and against asset-poor black Americans.¹⁴⁷

Given this difference, blacks do not have assets to bequeath (e.g., money and personal property) or to devise (i.e., real property) to successive generations, and thus they cannot achieve upward class mobility equal to whites. In the end, sedimentation represented the weight of history that undermines efforts to create racialized wealth equality.

C. American Apartheid: Persistent Racial Segregation and Spatially Concentrated Poverty

Does racial segregation, as an institutional practice, explain not only the rise but also the persistence of the black ghetto? In *American Apartheid*, Massey and Denton answer this question affirmatively and clearly. Racial segregation explains these residential and economic conditions.¹⁴⁸ Yet, we must acknowledge, as does Massey and Denton, that racial segregation has many social and historical layers. Nevertheless, for Massey and Denton, racial segregation constitutes the essential way to explain not only the origins of dark ghettos,¹⁴⁹ but also precursor to hypersegregation. In presenting the manner in which Massey and Denton carefully and analytically argue this major premise, I will proceed along the following sociological path: how whites constructed black ghettos,¹⁵⁰ how the ghetto persists in a racist society,¹⁵¹ how social structures contribute to the continuing causes of segregation,¹⁵² how social

147. *Id.* at 174.

148. See generally MASSEY & DENTON, *supra* note **.

149. See generally KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER (1965).

150. See MASSEY & DENTON, *supra* note **, at 74-78.

151. See *id.*

152. See *id.* at 83-114.

structures create underclass communities,¹⁵³ how social structures perpetuate the underclass,¹⁵⁴ how federal public policy fails to eradicate hypersegregation,¹⁵⁵ and how social structures open communities and eliminate discrimination from public life.¹⁵⁶

1. *Constructing the Black Ghetto.*—What constructed the black ghetto? Likewise, who constructed the black ghetto, from which even middle-class blacks cannot escape? In *American Apartheid*, Massey and Denton provides us with a clearly structural answer: *white racism*. And white racism expresses itself in this context as *racial segregation*. Keep in mind that racial segregation represents a complex problem. That is, racial segregation explains the intense isolation and extreme spatial concentration of black poverty. By poverty, they mean underclass status, and by spatial concentration, they mean ghettos, an idea that simply comes to mean that one racial group lives almost exclusively in a given geographic area. For Massey and Denton, racial segregation centers the problem of black poverty for a number of reasons, and it is their point to show how persistent racial segregation links itself inextricably with racially discriminatory practices that were specifically designed to create intense racial isolation, *viz.*, black ghettos.

First, before 1900, racial segregation did not exist, and therefore we had to construct the ghetto. Although one could identify neighborhood in which blacks lived, few areas existed in which blacks exclusively lived. During this time, blacks and whites, living most in the South, shared common social worlds, “spoke a common language, shared a common culture, and interacted personally [and regularly].”¹⁵⁷ After the Civil War, black-white living patterns changed not only because slavery no longer defined social roles, but also because employment patterns drove blacks into very poor housing stock. Nevertheless, while master-slave relationship were destroyed by the Civil War Amendments, the boss and worker moved relatively seamlessly into its place, and blacks and whites still maintained unequal but direct personal contact with each other.¹⁵⁸

Supported by complex social forces, racial segregation begins with black ghettos. In the south, Jim Crow politics and violence did not immediately mandate that blacks live in ghettos. In the north, whites needed black ghettos. Immigrant ghettos existed, but they were not exclusively Irish or Italian. As their numbers increased, whites, newly arriving immigrants too, felt ill at ease. If industrial captains’ use of black workers as strike breakers did not heighten white hostility and fear, then their increasingly large number certainly did. Southern out-migration drove them north. Newspapers added to the suspicion by printing retelling of black crimes and vices. Violence like the St. Louis Riot deepened the racial divide, and soon blacks faced hard times when they sought education, jobs,

153. See *id.* at 115-47.

154. See *id.* at 148-85.

155. See *id.* at 186-216.

156. See *id.* at 217-36.

157. *Id.* at 17-18, 19-26.

158. See *id.* at 26.

and housing. Not just poor but rich blacks too faced this color-line and violence, and it was increasingly white violence that drove blacks from white neighborhoods. Among more civilized whites, they rejected violence in favor of voluntary associations, zoning ordinances, boycotts, deed restrictions, and restrictive covenants.¹⁵⁹ With the ruling in *Buchanan v. Warley*,¹⁶⁰ local ordinances were ruled unconstitutional, and with *Shelley v. Kraemer*,¹⁶¹ restrictive covenants suffered the same fate.¹⁶²

Nevertheless, local real estate board adopted tactics to frustrate racial integration, and then they found ways to profit from it by engaging in "blockbusting." While these rulings slowed the rate at which social factors constructed black ghettos, white racist tactics and structural factors were still at work in the north and south, keeping pace with economic factors like industrialization and urban development patterns.¹⁶³

Until post-WW II, America's white racism arrayed formidable barriers like violence and neighborhood improvement associations to prevent blacks were integrating all white neighborhoods.¹⁶⁴ However, after WWII, a new structural barrier denied blacks access to single-family homes as well as better neighborhood with descent housing. Under this new structural barrier, private industry allied itself with the federal government. According to Massey and Denton, this structural alliance responded eagerly to white demands for new homes. Private industry built new homes, and whites bought with loan programs from the Federal Housing Administration ("FHA") and the Veterans Administration ("VA"). White cars, new highways pulled whites as well as industry out of the cities.¹⁶⁵ In addition to federal authorities, institutionalized racism within the real estate associations meant that real estate agents worked comfortably with white homeowners who did not wish to sell to blacks and who preferred to live in all white neighborhoods.¹⁶⁶ Financial institutions like banks and savings and loan associations frustrated integrationists blacks by denying them loans. Basically, between 1940 and 1970, institutionalized racism operated not only with federal authorities and financial institutions, but also within local real estate boards and urban housing markets.¹⁶⁷

If institutional racism within federal authorities, financial institutions, and urban housing markets worked to undermine an integration principle, they

159. *See id.* at 26-37.

160. 245 U.S.60 (1917).

161. 334 U.S. 1 (1948).

162. *See* MASSEY & DENTON, *supra* note **, at 41-42.

163. *See id.* at 40-41.

164. *See id.* at 42-43.

165. *See id.* at 43-45.

166. *See id.* at 48-50 ("In their personal view, the realtors studied by Helper appeared to share the prejudices of their white clients. Some 59% of her respondents rejected racial integration in principle, and 84% espoused an ideological stance that supported the exclusion of blacks from white neighborhoods.").

167. *See id.* at 50-51.

equally labored to force blacks into urban ghettos. In the 1930s, the federal government developed programs like Home Owners' Loan Corporation (HOLC), which increased home ownership by refinancing urban mortgages near default status and by granting low interest low to foreclosed owners so that they could regain their lost property. And the HOLC instituted "redlining" practices that made loans based on four risk categories,¹⁶⁸ but the central risk was racial integration. Like the HOLC, the FHA's *Underwriting Manual* favored "stable" neighborhoods, a proxy for same class, all white homeowners.

Accordingly, black neighborhoods or working class neighborhoods that bordered on black settlements were consistently placed in the fourth category and redlined. An HOLC private confidential reported concerned itself with expanding black population and maintaining fair market values. The HOLC influenced how lending institutions made loans by sharing their "Residential Security Map" with the industry, and without the benefit of FHA and VA loans,¹⁶⁹ the ever growing black population could not effectively leave densely occupied black neighborhoods.¹⁷⁰ And once they were locked into black ghettos, banks divested themselves from these communities so that blacks could not acquire loans for basic home repairs, and once in disrepair, black homes lost their value, affecting their ability to sell their homes.¹⁷¹ In the 1950s, these institutional practices led to urban decline and white flight. In response, urban renewal (or Negro removal) program would end black ghettos through public housing; yet, this program eliminated housing stock and displaced citizens. In the end, it created federally sponsored "second ghettos."¹⁷² In effect, when we couple these practices with urban renewal programs and the 1960s urban riots, the HOLC and other major institutions formed the basis on which the Kerner Commission emphatically declared that among other factors, social and economic problems flowed from *racial segregation*.¹⁷³ Enter the Fair Housing Act of 1968.¹⁷⁴

Despite the 1968 Act, racial segregation still continues virtually unabated,¹⁷⁵

168. *Id.* at 51. According to Massey and Denton,

Four categories of neighborhood quality were established, and lowest was coded with the color red; it and the next-lowest category virtually never received HOLC loans. The vast majority of mortgages went to the top two categories, the highest of which included areas that were "new, homogenous, and in demand in good times and bad" (to HOLC this meant areas inhabited by "American business and professional men"); the second category consisted of areas that had reached their peak, but were still desirable and could be expected to remain stable.

Id.

169. *Id.* at 51-55.

170. *See id.* at 41-49.

171. *See id.* at 54-55.

172. *Id.* at 55-57.

173. *See id.* at 57-59.

174. *See id.* at 192-200.

175. *See id.* at 96-109.

and Massey and Denton posit that racial discrimination must be its primary cause. Whites dispreferred to live with a large percent of blacks, and blacks prefer integrated communities. Accordingly, "when a black family moves into a formally all-white neighborhood, at least one white family's tolerance threshold is exceeded, causing it to leave."¹⁷⁶ Unfortunately, once whites leave, black homeowners replace them, and rather than leading to an integrated community, the all-white neighborhood becomes a black one. Massey and Denton describe Thomas Schelling's failed integration model.

Given strong black preferences for integrated housing, this departing white family is likely to be replaced by a black family, pushing the black percentage higher and thereby exceeding some other family's tolerance limit, causing it to leave and be replaced by another black family, which violates yet another white family's preferences, causing it to exit, and so on.¹⁷⁷

Yet, Massey and Denton argued that Schelling's model failed to account for the social structural mechanism that internalized active white prejudice. That is, whites can only abandon no longer all-white neighborhoods if they can escape to another still all-white neighborhoods. In addition to white prejudice and intolerance, what mechanism kept blacks out of newly created all-white communities? Besides structural forces like the real estate market, one mechanism is violence. White racist attitudes, all-white neighborhoods, and perceptions inferior blacks correlate to produce violence.¹⁷⁸ In some cases, these three factors have combined to create Section 3631 violations, some of which the federal government successfully prosecuted.¹⁷⁹ Yet, even if we do not experience intimidating violence or disinviting notices like "No Niggers Allowed," whites rely on subtle mechanisms like discouraging smiles or attitudes.¹⁸⁰ Whites will often lie or deceive interested blacks, or they will steer them to other neighborhoods.¹⁸¹ In the 1980s, housing audits discovered how pervasive housing discrimination remained for blacks.¹⁸² And when banks dry up credit if they perceive a neighborhood as unstable (e.g., transitioning from all-white to integrated), or if they deny credit to whites who wish to live in racially-integrated

176. *Id.* at 96.

177. *Id.*

178. See generally Robinson, *supra* note 91, at 69.

179. See *id.* at 144-55.

180. See, e.g., Reginald Leamon Robinson, *White Cultural Matrix and the Language of Nonverbal Advertising in Housing Segregation: Toward an Aggregate Theory of Liability*, 25 CAP. U. L. REV. 101 (1996).

181. See MASSEY & DENTON, *supra* note **, at 97-98.

182. See *id.* at 99-107. "One developer working near Chicago's South Side black community refused to deal with blacks at all: blacks were *always* told that no properties were available, even though 80% of whites were shown real estate. In the same 1988 study, realtors told 92% of whites that apartments were available but gave this information to only 46% of blacks." *Id.*

communities, then social institutions structurally resegregate neighborhoods.¹⁸³ After facing these obvious and subtle structural forces, blacks abandon their desire to purchase a home.¹⁸⁴

And even when blacks don't abandon their quest to find suitable housing stock outside of the black ghetto, they will more than likely not find a racially-mixed neighborhood. Blacks are more racially segregated than any other racial group. This segregation rises to such a level of intensity that Massey and Denton describes this social phenomenon as "hypersegregation."¹⁸⁵ Hypersegregation has five dimensions: *unevenness* (blacks over- or underrepresentation in neighborhoods); *isolation* (blacks rarely share neighborhoods with whites); *clustered* (blacks form one large contiguous enclave or scattered site housing); *concentrated* (blacks live in a very small area or settle sparsely throughout an urban environ); and *centralized* (blacks live in a spatially focused area around an urban core or along its periphery).¹⁸⁶ Blacks live in segregated neighborhoods on these five dimensions simultaneously.¹⁸⁷ As a result, blacks cannot exit from these communities; or at least, they cannot escape into integrated communities. Using tactics of the post-WWII era, whites use discriminatory practices to keep blacks out of their neighborhood, and whites refuse to live near black neighborhoods. At the very least, by conjoining these discriminatory practices and an unwillingness to live with blacks, white racial prejudice effectively reproduces the black ghetto. What keeps blacks in these neighborhoods is white racism, structural mechanisms, and institutional practices.¹⁸⁸ In the end, hypersegregation means that black ghetto will spatially organize black urban living.¹⁸⁹

According to Massey and Denton, the structural factor that underlies the constructing of the black ghetto is white racial prejudice, a racially discriminatory attitude that finds support in existing institutional mechanisms.¹⁹⁰ In this way, unlike Oliver and Shapiro wrote relied on a race/class critique of racial material inequality, Massey and Denton posit that race explains continuing residential segregation more than class.¹⁹¹ "When it comes to housing and residential patterns, therefore, race is the dominant organizing principle. No matter what their ethnic origin, economic status, social background, or personal characteristics, African Americans continue to be denied full access to U.S.

183. *See id.* at 105-08.

184. *See id.* at 109.

185. *Id.* at 74.

186. *See id.*

187. *See id.* at 74-78.

188. *See id.* 81-82.

189. *See id.* at 144 ("But then as now, the persistence of racial segregation in the housing market has meant that middle-class blacks are less able to isolate themselves from the poor than the middle classes of other groups. As a result, middle-class blacks live in much poorer neighborhoods than do middle-class whites, Hispanics, or Asians.").

190. *See id.* at 109-14.

191. *See id.* at 84-96.

housing markets. . . . The end result is that blacks remain the most spatially isolated population in U.S. history."¹⁹²

2. *The Rise and Persistence of the Black Underclass*.—For Massey and Denton, institutional racism gave rise to the black underclass, and this social phenomenon persists today because institutional forces still operate against minorities. As Massey and Denton aptly pointed out in *American Apartheid*, racial segregation represents the endpoint of concerted institutional racism to deny blacks access to all white neighborhoods, and this institutional practice was to be ameliorated by the Fair Housing Act of 1968. By 1973, it was clear that the Act was failing. Yet, despite this Act and its later reforms, we can still comfortably conclude that American remains a racially segregated nation.¹⁹³ Given the depths to which white prejudice pervades institutional practices and socio-structural mechanisms, residential segregation remains not only an extant social problem, but also the etiology for the black underclass.

Therefore, in addressing the origins and persistence of the black underclass, we must as Massey and Denton does look to the black ghetto. In it, we find root causes, sources that originate outside of the black community, sources that are structural and institutional in nature. After 1973, any increase in poverty gave rise to economic divestment. Contractions turned into extreme privations. "Joblessness, welfare dependency, and single parenthood become the norm, and crime and disorder are inextricably woven into the fabric of daily life."¹⁹⁴

Yet, Massey and Denton insist that the rise and persistence of the black underclass grew out of deliberate structural and institutional policies. First, I will address the rise of the black underclass, and then I discuss why in Massey and Denton's estimation it persists. First, by isolating blacks, even at very low segregation levels, the neighborhood environment immediately deteriorates. Moreover, blacks experience greater levels of poverty in racially segregated neighborhoods. In all black neighborhoods, all blacks suffer high levels of poverty. Yet, "one-third of whites who live in all-white neighborhoods experience the lower white poverty rate of [ten percent]."¹⁹⁵

Another factor in the rise of the black underclass is race and class segregation. How does these kinds of segregation contribute to the making of the black underclass? According to Massey and Denton, racial segregation concentrates black into small spatial areas, and this concentration raises poverty to which blacks will be exposed. It correspondingly lowers the interpersonal contact between blacks and whites. "By itself, racial segregation concentrates poverty in *black* neighborhoods, but the addition of class segregation concentrates poverty primarily in *poor black* neighborhoods. By adding class segregation to the simulation exercise, we exacerbate the degree of poverty concentration that is imposed on poor blacks because of racial segregation."¹⁹⁶

192. *Id.* at 114.

193. *See id.* at 200-12.

194. *Id.* at 118.

195. *Id.* at 122.

196. *Id.* at 124.

However, Massey and Denton stress that race makes for concentrated black neighborhood isolation and poverty. Class heightens and reinforces what white racism and institutional structures make and sustain.¹⁹⁷ As Massey and Denton conclude:

[R]acial segregation concentrates poverty, and it does so without anyone having to move anywhere. With or without class segregation, residential segregation between blacks and whites builds concentrated poverty into the residential structure of the black community and guarantees that poor blacks experience a markedly less advantaged social environment than do poor whites.¹⁹⁸

In creating black underclass, we must see how racial segregation correlates with other existing structural factors like housing abandonment and crime interact with poverty rates. To this degree, racial segregation conjoins with self-perpetuating downward spirals. As such, all critical factors interact, each feeding and reinforcing the others, so that when one landlord divests from a poor, working-class neighborhoods, others quickly follow suit. For example, let's consider a working-class neighborhood begins to experience a transition from white to black. Prior to the transition, this neighborhood may be well maintained by owners and residents. Yet, if the newcomers have less income, then homeowners may have fewer resources for building maintenance. Other landlords may follow suit. Unkept yards soon share company with physical disrepairs like peeling paint. Dilapidated buildings signal economic defections, and then the downward spiral may become meteoric. Small economic decisions yield broad spectrum and negative results. "At some point, a threshold is crossed, beyond which the pattern becomes self-reinforcing and irreversible."¹⁹⁹

If the city becomes a totally segregated one, then blacks become trapped in neighborhoods which lacks an economic infrastructure, so that service outlet decline, so that joblessness rises, so that vacant lots predominate, so that social order will breakdown, so that black-on-black crime becomes commonplace, crime and dangerous, and so that children abandon their childhoods.²⁰⁰

*D. Racialized Wealth Inequality and the Black Underclass:
Structural Inequality and Institutionalized Segregation*

In *Black Wealth/White Wealth* and *American Apartheid*, structural barriers and institutional policies explain racialized wealth inequality and the black underclass. Neither treatment of poverty broadly recognized any role by the individual.²⁰¹ And when Oliver and Shapiro and Massey and Denton introduced

197. See *id.* at 125-30.

198. *Id.* at 125.

199. *Id.* at 130.

200. See *id.* at 132-39.

201. Cf. Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1628-29 (1991) ("This forgetting of the "we" who do the "expounding," this bracketing of the 'I'—in short, this

an individual actor, they appeared to do so to illustrate specifically and perhaps emotionally how people sought a way out of poverty, only to have the larger, white race dominated system thwart their every, innovative approach. In the end, structural inequality and institutional segregation, all "external," objective realities over which the mere human agent has absolutely no control, explain racialized wealth inequality²⁰² and the persisted black underclass.²⁰³

Recall how Oliver and Shapiro pointed to the manner in which the racialized state policy mandated that black self-employment take an "economic detour" so that black business could not have a sustained impact on white enterprises. Likewise, the sedimented nature of this wealth inequality, especially because it had been cemented by racialized policies, meant that even if blacks have actually specifically succeeded, they could, and still cannot, close the gap between black income and white wealth.²⁰⁴ Why? For Oliver and Shapiro, critical structural opportunities may no longer exist so that even with Herculean efforts, black may still not achieve relative parity with white wealth.²⁰⁵

Equally important, when Oliver and Shapiro gave us different opportunities to understand the role that individual might play in creating wealth opportunities for themselves, they do so in a manner that reinforced that structural barrier may prove too impenetrable for blacks, unless they have acquired a degree of access to wealth making opportunities that have intergenerational origins.²⁰⁶ Keep in mind that these intergenerational origins meant that they fathers or grandfathers had wealth and they passed it along to the next generation. It must follow still that racialized state policies gave whites grander opportunities, especially owing

eclipse of the problem of the subject--became a vital, pervasive, constitutive characteristic of American legal thought. Indeed, American legal thought has been conceptually, rhetorically, and socially constituted to avoid confronting the question of *who or what thinks or produces law.*") (emphasis added).

202. See OLIVER & SHAPIRO, *supra* note *, at 22 ("White families who were able to secure title to land in the nineteenth century were much more likely to finance education for their children, provide resources for their own or their children's self-employment, or secure their political rights through political lobbies and the electoral process.").

203. See MASSEY & DENTON, *supra* note **.

204. See OLIVER & SHAPIRO, *supra* note *, at 12-13. They write:

Disparities in wealth between blacks and whites are not the product of haphazard events, inborn traits, isolated incidents or solely contemporary individual accomplishments. Rather, wealth inequality has been structured over many generations through the same systematic barriers that have hampered blacks throughout their history in American history: slavery, Jim Crow, so-called de jure discrimination, and institutional racism.

205. See *id.* at 5 ("the same social system that fosters the accumulation of private wealth for many whites denies it to blacks, thus forging an intimate connection between white wealth accumulation and black poverty.").

206. See *id.* at 7 ("Segregation created an extreme situation in which earlier generations were unable to build up much, if any, wealth. . . . Until the 1960s there were few older African Americans with the ability to save much at all, much less invest. And so savings and no inheritance meant no wealth.").

to slavery and Jim Crow, which entrenched white wealth at level to which only the rarest black entrepreneur might reach. Given the history of racialized state policies and the systematic sedimented inequality, blacks cannot pass wealth to successive generations.²⁰⁷ In brief, the racialization of state policy persists as a key factor that must explain why blacks (and poor whites) cannot attain equal wealth accumulation opportunities.²⁰⁸

Oliver and Shapiro did introduce human agency, and in so doing, they reinforced their initial premise: racialized state policy (i.e., institutional racism) fostered structural climates in which poor blacks suffer even when they sought to better themselves. For example, Oliver and Shapiro looked at “reserve redlining.”²⁰⁹ This predatory lending practice targets poor, often semi-illiterate minorities or the elderly, “guiding” them into borrowing terms that trap them deeper into urban ghettos and perhaps underclass status. These borrowers face severe risk, one of which may mean losing their home.²¹⁰ Oliver and Shapiro highlighted the Reagan’s administration weakening of banking regulations. They focused on “strip-mining minority neighborhoods of housing equity.” They cited favorably civil right activists who declared that small, unregulated finance companies “rape” minority communities. And in so doing, they raised minorities to the surface of their text as human only so that they can effectively illustrate that poor black live not like subject but like object on which larger, structural forces come to bear.²¹¹ Consider Oliver and Shapiro’s recounting of the Christine Hill story.

It started with a leaky roof and ended in personal bankruptcy, foreclosure, and eviction. Using Hill’s home as collateral, the lender charged interest that, according to Rob Well’s piece in the 10 January 1993 *Chicago Tribune* “made double-digit pawnshop rates look like bargains.” The Hills couldn’t pay. The lender was a small and unregulated mortgage firm, similar to those often chosen by low-income

207. See *id.* at 151-50 (“[W]e argued that a plethora of state policies from slavery through the mid-twentieth century crippled the ability of blacks to gain a foothold in American society. Owing to their severely restricted ability to accumulate wealth combined with massive discrimination in the private sector and general white hostility, black parents over several generations were unable to pass any appreciable assets on to their kin.”).

208. See *id.* at 12-13.

209. *Id.* at 21 (“Senator Donald Riegle of Michigan in announcing a Senate Banking Committee hearing on abuse in home equity and second mortgage lending pointed to ‘reverse redlining.’ This means providing credit in low-income neighborhoods on predatory terms and ‘taking advantage of unsophisticated borrowers.’”). See also Darnellena Christie Burnett, *Justice in Housing: Curbing Predatory Lending*, NAT’L B. ASS’N MAG., Mar.-Apr. 2001, at 14-15, 21-22.

210. See OLIVER & SHAPIRO, *supra* note *, at 21 (“Families lost their homes or were facing foreclosure in over three-quarters of the cases. Only fifty-five of the 406 families still possessed their homes and did not face foreclosure. The study also showed that the maps of redlined areas and high-interest loans overlapped.”).

211. See *id.* at 20-21.

borrowers because mainstream banks consider them too poor or financially unstable to qualify for a normal bank loan.²¹²

Undoubtedly, larger, structural forces did operate in the Hills story, and they had to experience a loss, both personal and emotional. Yet, Oliver and Shapiro presented the Hills as if they lacked any agency, as if they bore absolutely no responsibility for the manner in which they entered into this predatory experience and in which they internalized their experience. Oliver and Shapiro proffered a suggestion that could inform how we might understand the Hills' experience: "The attorney representing some of [the approximately twenty thousand other low-income Georgian homeowners] is quoted in Well's *Tribute* article as saying: 'This is a system of segregation, really. We don't have separate water fountains, but we have separate lending institutions.'"²¹³

Throughout *Black Wealth/White Wealth*, Oliver and Shapiro provided individual case history so that we can easily view larger, structural forces at play. In the Hills' case, the larger, structural forces denied them equal access to mainstream lending institutions where they would arguably not pay usurious borrowing rates, and where they would have an equal chance to repair their home or borrow against its equity. By borrowing from secondary lending markets, they suffered a dismal fate, one that Oliver and Shapiro no doubt could have easily predicated, in which the Hills lose their home and lose their personal property through bankruptcy. Without a home that the Hills could leverage to fund their children's education, they by perforce must run the risk of losing a generation. Yet, Oliver and Shapiro did point out that material inheritance takes at least three forms: *cultural capital*, *advanced inheritance*, and *bequeathed assets*.²¹⁴ While blacks have received meager help from their parents, *viz.*, \$3000, when they buy homes,²¹⁵ whites got levels of financial assistance that for Oliver and Shapiro must have flowed a history of unequal material accumulation opportunities, *viz.*, larger, structural forces.

Consider the impact of individual inheritance choices, all of which flowed not only from the racialization of state policy but also from sedimented material inequality.

Alicia and Ed, who are white, come from affluent families. Ed's mother's family owned a chain of grocery stores and a small chain of dress shops. His father has inherited a substantial amount of money from his family's manufacturing concern. Alicia's mother taught school

212. *Id.* at 21.

213. *Id.*

214. *See id.* at 152, 154-55.

215. *See id.* at 154. Consider a case in which the black family could not provide an advance inheritance so that their children could easily afford to get a university education and not start their life under a heavy debt burden. "Albert and Robyn took out some loans to finance their education at a public university. Stacie starts her law career \$80,000 in the red. Among the blacks interviewed, only Mary Ellen, whose parents were quite wealthy and who has now moved into the family business, had her college education paid for." *Id.* at 153-54.

and her father was a self-employed attorney, then a state judge. Alicia went to a private school where her mother taught Latin and English, and Ed spent many years at a boarding school. Their families hoped these private institutions would furnish a better education than their public counterparts. For the same reason as well as others, Ed and Alicia will probably send their two children to private school too.²¹⁶

In *Black Wealth/White Wealth*, Oliver and Shapiro only permitted individual cases to present in this social history of poverty so that they could effectively illustrate that blacks and whites fared differently and materially better, even though blacks and whites may have been similarly situated and equally motivated to provide a better life not only for themselves but also for their children. This social history of poverty turned on deeply entrenched asset accumulation opportunities and on grossly maldistributed wealth and income. Although Oliver and Shapiro acknowledged that blacks did experience material success, especially from 1939 to the early 1970s when the civil rights movement urged Congress to enact antidiscrimination laws and when the nation's economy grew at an extraordinary rate.²¹⁷ Yet, for these sociologists, structural barriers cannot promote equal opportunity and results, and so while blacks have suffered and while some blacks make economic progress, they cannot eradicate the sedimented, structural inequality on which white wealth grew and by which blacks, regardless of their motivation, lagged further behind whites. One way to remedy this material inequality, for Oliver and Shapiro, is to guarantee not only equal opportunity but also "equal achievement."²¹⁸ In the end, larger, structural forces will frustrate individual cases unless broad, structural changes eliminate sedimented material inequality.²¹⁹

Likewise, in *American Apartheid*, Massey and Denton focused on larger, structural forces when they examined the persistence of urban ghettos and the underclass. Unfortunately, like Oliver and Shapiro, they too eliminated human agents (e.g., the subject), placing them strategically throughout this sociological exposition of poverty where they best served to illustrate how larger, structural forces created and maintained "hypersegregation." For Massey and Denton, white racial prejudice coupled with institutional barriers not only froze blacks in urban ghettos, but also entombed them in the black underclass. A history of racism, real estate brokers, and institutional forces like banking, HOLC, and FHA conjoined to deny blacks access to better communities. Hypersegregation thus became a "reality," principally because most blacks simply cannot escape beyond vanilla rings that encircled urban ghettos. Therefore, hypersegregation worked like racialization of state policy and sedimented material inequality; they symbolized larger, structural forces that have remained insensitive to individual aspirations and desires. In effect, Massey and Denton purported that we need not

216. *Id.* at 153.

217. *See id.* at 23-25.

218. *Id.* at 177-78.

219. *See id.* at 179-93.

focus on human agents, for they cannot overcome the dark oppression that is residential segregation and the black underclass.

In *American Apartheid*, Massey and Denton rely on structural factors like underclass poverty and the intensity of spatial concentration to conclude that blacks cannot truly escape the ghetto. On a broader social level, Oliver and Shapiro make the same point.²²⁰ This conclusion confused me. Does society victimize inner city minorities when it adopts policy that intensifies their isolation? Or, do we look to clearly identifiable behavior to explain the degree and depth to which racism, inner city ghettos, and hypersegregation explain by minority blacks and others get isolated in ghettos? At one point, they assert that extreme racial isolation occurred because whites engaged self consciously and purposefully in institutional practices that they orchestrated to have this effect.²²¹ If true, the white behavior looks less institutional and more individual or group related. By institutional, I mean a practice that continues without regard to who occupies the decision office. Yet, institutions cannot exist without human energy. They require us. We focus our collective energies through them. On a large social scale, humans and institutions form symbiotic ties. Whether individual conduct or institutional practices, we—each of us—act, either in concert or as single agent, but we act. What then explains hypersegregation—whites, social structure, institutional practices, or both?

Why the confusion? Massey and Denton recognize that social structures perpetuate racial isolation, and they also wish to say that blacks don't live in intense racial isolation because they, due to personality traits, created their own residential difficulties. They take a familiar approach. To this end, they assert that the "effect of segregation on black well-being is structural, not individual. Residential segregation lies beyond the ability of any individual to change; it constrains black life chances irrespective of personal traits."²²² With this approach, Massey and Denton have thoroughly reduced blacks to victims, and in so doing, they have completely omitted blacks and other urban minorities from the social equation entirely.

When I lived in New York City ghettos, particularly in publicly subsidized housing projects that were operated by the New York City Housing Authority, I knew that I could not destroy the physical blight that surrounded me. At the time, I knew that I could not then earn enough money to rebuild my community. I knew that I could not force local city officials to provide city services as if the Lillian Wald Projects or the Seward Park Extensions were Chelsea or the upper River Side. At the same time, I also knew that I simply *lived* in the ghetto. I was not *of* the ghetto. My ghetto "walls" simply *housed* my family; they did not *bind* my mind, my thoughts, my dreams. While I could not physically alter my

220. OLIVER & SHAPIRO, *supra* note *, at 68 ("We contend that the buried fault line of the American social system is who owns financial wealth—and who does not. The existence of such a wealthy class ensures that no matter the skills and talents, the work ethic and character of its children, the latter will inherit wealth, property, position, and power.").

221. MASSEY & DENTON, *supra* note **, at 2.

222. *Id.* at 2-3.

neighborhood, one predominated by blacks and Latinos, I could extent my mind beyond where I lived. I live where I live, but did structure mandate that I reside forever in the Lillian Wald Projects? If so, no one told me so. I am not unique; others have moved their minds and bodies beyond inner city ghettos. As such, what of my life chances? What of my personal traits?

Why should my personal traits matter, even if I live within structural practices that we have co-created to isolate me racially within urban ghettos? Given the Matrix, it matters because I like everyone share an energy relationship, regardless of my race, my class, my income, my wealth, etc. It matters because I can only be victimized if I think that I have been. I do not mean to suggest that the state officials cannot abridge my civil rights. I do not mean that a private citizen cannot wrongfully defraud me of personal funds. I do not mean that a corporation through its officers and directors cannot practice consumer fraud, thus breaching a commercial contract under which I bought goods. Notwithstanding these constitutional and civil violations, what matters is how I choose to experience these events. Parents, authority figures, and cultural norms cannot influence how I think so that I learn to surrender my choice to cause deliberately what happens next in my life. Once so influenced, I will allow the effect of other people's choices, including those of my parent's making, to determine my life's course.

If I allow others to influence me, and if they tell me that living in abject poverty and that limiting my personal world to a ghettos "wall" mean suffering, some kind of personal rejection by society, then I will more than likely internalize this perspective. If I also learn that I suffer in this manner because I am black or poor or low family station, then I will more than likely experience my personal world through race, class, or station. More than likely, my parent acquires this perspective from others who she trusted including mass culture, and to this extent, she was connected to the Matrix. Does the Matrix carry only negative, horrible energy for poor urban blacks? In this Matrix, the energy carries diverse messages because we all have diverse experiences. Why then would she choose a negative one over others? Regardless, I don't anyone for what choices they make. In the end, I make this point because social structures matter and personal traits matter too.

II. A NEW AGE CRITICAL LEGAL THEORY AND THE CO-CREATIVE POWER OF RACE CONSCIOUSNESS AND POVERTY

A. Introduction

In a New Age critical legal theory, we co-create all experiences.²²³ As Ernest Holmes would argue, poverty follows from abnormal thinking, and thus it is an

223. SETH, PERSONAL REALITY, *supra* note 4, at 4 ("You project your thoughts, feelings, and expectations outward, then you perceive them as the outside reality. When it seems to you that others are observing you, you are observing yourself through the standpoint of your own projections.").

abnormal condition. Yet, poverty only exists because we meditate on it as a necessary reality. To this extent, as Ruíz would argue, the state, our parents, our friends, our adaptation, or our culture forms an agreement with us, and after we have acquired the language for reaffirming this agreement, then some of us co-create poverty. Others co-create wealth.²²⁴ Still others co-create residential segregation. Everyone who chooses poverty as a childhood experience can elect different ways of experiencing material abundance. And those who select a birth experience in which material abundance feels like the proverbial "silver spoon" can too know poverty. As Seth clearly points out:

The structure of probabilities deals with parallel experience on all levels. Your consciousness picks and chooses to accept as real the results of, and ramifications of, only certain overall purposes, desires, or intents. You follow these through a time structure. Your focus allows other just-as-legitimate experience to become invisible or unfelt.²²⁵

In this way, Ruíz proffers an excellent point. Society seeks to hook our attentions so that, especially through the familiarity and comfort and trust of our parents, we learn to accept certain agreements. Agreements structure the manner in which we co-create and expect certain events, all of which reinforce and stabilize our knowing about our personal worlds and manifold realities. According to Seth, "you create your experiences through your expectations."²²⁶ Accordingly, if our selected focus, viz., "race-focused" consciousness, permits us to screen out "just-as-legitimate experience," then who co-creates poverty? Who co-creates wealth? Who co-creates residential segregation?

Unfortunately, by embracing structural sociology, Oliver, Shapiro, Massey, and Denton must reject the implicit connection between agreement and external reality. Even modern physicists acknowledged that subjects create the reality that they experience. As Seth points out, "You always know what you are doing, even when you do not realize it."²²⁷ Why then do we continue to internalize

224. STANLEY & DANKO, *supra* note 36, at 3-4. Stanley and Danko write:

The large majority of these millionaires are not the descendants of the Rockefellers or Vanderbilts. More than 80 percent are ordinary people who have accumulated their wealth in one generation. They did it slowly, steadily, without signing a multimillion-dollar contract with the Yankees, without winning the lottery, without becoming the next Mick Jagger. Windfalls make great headlines, but such occurrences are rare. In the course of an adult's lifetime, the probability of becoming wealthy via such paths is lower than one in four thousand. Contrast these odds with the proportion of American households (3.5 per one hundred) in the \$1 million and over net worth category.

Id.

225. 1 ROBERTS, *supra* note 15, at 52-53.

226. SETH, PERSONAL REALITY, *supra* note 4, at 11.

227. *Id.* at 4. See GIDDENS, CONSTITUTION, *supra* note 34, at xxii-xxiii. In effect, Seth suggests that a person *can* know what and why she does a given thing. On this point, Anthony Gidden writes:

Human agents or actors – I use the terms interchangeably – have, as an inherent aspect

beliefs, agreements, or expectations that co-create poverty?²²⁸ By discounting the beliefs, agreements, or expectations by which the poor live in the context in which they must place themselves, Oliver, Shapiro, Massey, and Denton reject implicitly any inherent value in studying the inextricable links between race consciousness and experiences. In New Age critical legal theory, a person's beliefs, agrees, or expects work intimately with and necessarily co-create a person's experiences, material abundance, and at the very least the social reality in which she lives. Accordingly, a New Age critical legal theory posits that a person can only experience that which she has already projected into the world.²²⁹

Given this New Age critical legal theory, in which victims do not exist, in which we co-create all experiences because we are powerful reality creators, I posit that *Black Wealth/White Wealth* and *American Apartheid* must be rather excellent sociological narratives that construct poverty as external, objective reality over which the poor have no control.²³⁰ As such, as they aptly and consistently recommend, America must alter itself structurally so that blacks,

of what they do, the capacity to understand what they do while they do it. The reflective capacities of the human actor are characteristically involved in a continuous manner in the flow of day-to-day conduct in the contexts of social activity. But reflexivity operates only partly on a discursive level. What agents know about what they do, and why they do it – their knowledgeability *as* agents – is largely carried in practical consciousness. Practical consciousness consists of all the things which actors know tacitly about how to “go on” in the contexts of social life without being able to give them direct discursive expression.

Id.

228. SETH, PERSONAL REALITY, *supra* note 4, at xvii. Seth aptly writes:

No one forces you to think in any particular manner. In the past you may have learned to consider things pessimistically. You may believe that pessimism is more realistic than optimism. You may even suppose, and many do, that sorrow is ennobling, a sign of deep spiritualism, a mark of apartness, a necessary mental garb of saints and poets. Nothing could be further from the truth.

Id.

229. *Id.* at 4. Seth writes:

You *are* the living picture of yourself. You project what you think you are outward into flesh. Your feelings, your conscious and unconscious thoughts, all alter and form your physical image. This is fairly easy for you to understand.

It is not easy, however, to realize that your feelings and thoughts form your exterior experience in the same way, or that the events that appear to happen *to* you are initiated by you within your mental or psychic inner environment.

Id. See JOHN R. SEARLE, THE REDISCOVERY OF THE MIND 1 (1992) (“Mental phenomena are caused by neurophysiological processes in the brain and are themselves features of the brain. . . . I call it ‘biological naturalism.’ Mental events and processes are as much part of our biological natural history as digestion, mitosis, meiosis, or enzyme secretion.”).

230. Cf. Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L & SOC. CHANGE 659 (1989).

whites, and others can enjoy both equal opportunity and equal achievement. Along the way, Oliver, Shapiro, Massey, and Denton destroy or mute the subject, rendering blacks either as emotionally and historically patterned to fail or as perennial victims of something behemoth and daunting—*dominant social structures*.

In this way, *Black Wealth/White Wealth* and *American Apartheid* diminish the absolutely central role that our race consciousness, especially minorities, plays in co-creating personal worlds and maintaining manifold social realities. In this essay, I have already argued that blacks, whites, and others must be very powerful reality creators who simply cannot victimize each other. In one world, the absence of material abundance can be viewed as poverty, as suffering. In another world, the absence of material wealth can be view as an experience that reflects a person's inner reality, as a confirmation, as an opportunity. Accordingly, many blacks live in different personal worlds and social realities, even though they live next door to each other, and even though they work in the same department, on the same floor, for the same company. Some of these blacks will work their entire lives and die poor. Some of them will work their entire lives and garner vast wealth. As Thomas Kuhn properly argued, new paradigms co-exist with old ones.²³¹

Black Wealth/White Wealth and *American Apartheid* do not ask the following questions: Why do the dominant social structures affect some blacks but not others? Are some blacks adapting differently? Are some blacks deeply ensconced in the culture of poverty? Are some blacks bounded by learned helplessness? These questions apply to whites and others. Notwithstanding Oliver and Shapiro's point that racialization of state policy and sedimented wealth inequality still have present effects that limit how blacks and whites acquire asset accumulation opportunities, and notwithstanding Massey and Denton's observation that residential segregation driven by white racism explains the origins and persistence of the black underclass, we must move beyond race.²³² Accordingly, we must ask: do some people believe that they live not as participators but as observers? As such, do they believe that they have no affect on (or control of) their physical world? Do they think that only one physical world exists? Have they learned through agreements do deny "a spectrum of all possible realities"? What are their "overall purposes, desires, or intents"? How did they acquire such purposes, desires, or intents? By focusing on agreements, purposes, desires, or intent, are we simply living out lives as *domesticated humans* or are we in training to live as *angelic humans*?

From a New Age perspective, these questions suggest that each of us chooses the road that leads to our personal self-discovery. Our roads exist coextensively with others, and we can alter and bend our roads at will. Because many social

231. See generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1996) (discussing the institutional and academic tensions between competing normal sciences (i.e., paradigms)).

232. See generally RICHARD J. PAYNE, *GETTING BEYOND RACE: THE CHANGING AMERICAN CULTURE* (1998).

realities exist simultaneously with others, and different segments of society embrace one or more of these social realities, each of us relies on others to practice co-creating wealth, poverty, and residential segregation. And as Robert Ornstein points out, we use these personal worlds and social realities transactionally as we negotiate different settings.²³³ As a result, equal opportunities do exist coterminously with unequal opportunities. Real opportunities for asset accumulation exist coextensively with unreal ones. Extremes of wealth and poverty can exist literally within city blocks or a few miles from each other. And affluent blacks, even those who may conclude that America can still do more, may see America as a nation of equal opportunities (or a nation of relatively increasing equal opportunities). Other blacks will view America as a nation of white opportunity and black oppression, a place where hard working black men perennially live under the hobnail boot of white prejudice.²³⁴ Likewise, whites may garner financial assets or other opportunities because they focus on moving upward and onward, having little if any time for what may be wrong with America.²³⁵ Other whites simply cannot see beyond the bleak horizon, the one first shown to them by prior generations, the one etched out for them by the day-to-day struggle to earn a simple living. Regardless, each of these personal and social realities operates to delimit our perspectives, even among those who we may deem progressive and smart.²³⁶

Given that personal worlds and manifold social realities exist, which point of view is correct? In short, they all are. Neither is more or less correct than the other. In reaching this conclusion, I do not embrace any argument that excuses collective institutional practices that justify lost or denied opportunities for all angelic humans. Unfortunately, neither *Black Wealth/White Wealth* nor *American Apartheid* acknowledges that manifold social realities exist coextensively, ultimately explaining why some blacks succeed and why some blacks live in poverty, why some whites acquire wealth and why some whites come into poverty and *hold* onto it until their deaths. *Black Wealth/White Wealth*

233. See ROBERT H. ORNSTEIN, *THE PSYCHOLOGY OF CONSCIOUSNESS* (1972).

234. See generally WILEY, *supra* note 37.

235. See MICHAEL DYSON, *RACE RULES: NAVIGATING THE COLOR LINE* 4 (1996) ("Then [the white writer] makes a remarkable statement: 'In all sincerity, race isn't much of an issue for mainstream white America. We're busy. It's a complicated world. We have bigger problems to deal with. We're too preoccupied with simple survival to go around organizing systematic prejudice of any kind.'").

236. See ORNSTEIN, *supra* note 233, at 3. Ornstein aptly writes:

Our "ordinary" assumptions about the nature of the world are generally useful to us. As we attempt to achieve a stable consciousness, we continuously "bet" about the nature of reality. We immediately assume that our rooms are "really" rectilinear, that a piece of coal is "really" black, that one person is intelligent, another aggressive. . . . [O]ur world is conservative. It is quite difficult for us to alter our assumptions even in the face of compelling new evidence. We pay the price of a certain conservatism and resistance to new input in order to gain a measure of stability in our personal consciousness.

Id.

and *American Apartheid* simply continue to cast blacks as victims, whether historical or present-day. In many ways, *Black Wealth/White Wealth* and *American Apartheid*, despite their rather radical ways of examining poverty and residential segregation, can be viewed as Ruíz's "hooking" of our attention. They construct poverty as if it exists as an external, objective reality over which blacks have no control, in which blacks played no active, co-creative role. And in this way, *Black Wealth/White Wealth* and *American Apartheid* encourage us to view blacks as *helpless*, whites as *racism*, and structural as *hegemonic*. By examining poverty and residential segregation in this manner, *Black Wealth/White Wealth* and *American Apartheid* reinforce the agreement that we must live with poverty unless and until America embraces the remedies that they propose,²³⁷ even though these remedies require the active, open-hearted participation of powerful reality creators like blacks, whites, and others.

B. New Age Philosophy: Basic Premises

New Age philosophy begins with three basic premises. First, we possess an enlightened soul within us, and second, we contain the power of law within each of us.²³⁸ Many religious leaders like Reverend Martin Luther King, Jr., had invited us to think in this way,²³⁹ except that they also urged us to worship Jesus in order to know "God." In New Age philosophy, we practice Jesus' teaching, recognizing that he was an ascended Master, without transmuting him into a deity to whom we must pray.²⁴⁰ When distilled, these premises yield a simple principle: we are absolutely one with God, and God lives within each one of us.²⁴¹ With this principle, we live, work, and grow self-consciously with Spirit (or God) as a self-realized person,²⁴² one who possesses an awakened spiritual consciousness in a manner that differs very little from an eastern yogi.²⁴³

237. See OLIVER & SHAPIRO, *supra* note *, at 177-93; MASSEY & DENTON, *supra* note **, at 224-36.

238. See 1 LEE CARROLL, KRYON—THE END TIMES: NEW INFORMATION FOR PERSONAL PEACE 58 (1993).

239. See A TESTIMONY OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. (James Melvin Washington ed., 1991).

240. See 3 CARROLL, *supra* note 7, at 59; see also 2 LEE CARROLL, KRYON—DON'T THINK LIKE A HUMAN!: CHANNELLED ANSWERS TO BASIC QUESTIONS (1994).

241. MARCINIAK, *supra* note 4, at 130 ("Prime Creator is *all things*.").

242. See 1 WALSCH, *supra* note 13, at 43. According to Book I, God states:

This is the goal of your soul. This is its purpose—to fully realize itself while in the body; to become the *embodiment* of all that really is.

This is My plan for you. This is My ideal; that I should become realized through you. That thus, concept is turned into experience, that I might know my Self *experientially*.

Id. (emphasis in original).

243. See PARAMAHANSA YOGANANDA, AUTOBIOGRAPHY OF A YOGI 238-39 (1990); see also MARCINIAK, *supra* note 4, at 242. According to the Pleiadians:

The New Age philosophy's third basic premise provides that we co-create our personal and perforce social realities. Preliminarily, this premise contains within it the eternal idea that God grants all human life with free will.²⁴⁴ Within Western philosophy, this concept amounts to an old, but contested saw.²⁴⁵ Notwithstanding this philosophical tension in western thought, New Age posits that we all co-create our moment-to-moment world. How can we co-create our personal world and social realities? It is quite simple: we think; we have emotions, and we have consciousness. As in other philosophical traditions, thoughts constitute a form of energy, and this energy shapes "reality." It does not mean that I shape everyone else's reality. It does mean that through my own free will, I shape my own. Yet, parents impose their focus, purposes, desires, and intents on their children, and in this process of socialization, children become quite domesticated. This socialized domestication process quiets most children's inner flames, reducing their audible godheads to passing whispers. In this way, as Ruíz and Seth pointed out, society can influence how we co-create our personal worlds and social realities, and to this degree, the state imposes a mass cultural consciousness on its citizens. Nevertheless, the citizen uses her co-creative power to reinforce dominant social structures with which she had formed an agreement and by which she can learn to live comfortably or otherwise with black poverty.²⁴⁶

Under this free will concept, this very simple proposition, however, gets a bit complex when we acknowledge that outside forces (e.g., ideas) can influence how we think. If a sufficiently large enough group of people has been influenced to think in a given pattern (e.g., the rich get richer, the poor get poorer), then this group thought can contribute to a consciousness matrix,²⁴⁷ a once contested idea,

As you raise your vibratory rates, you become your light body. You will see the change in your body literally. Your will become more vital, more youthful, more nourished in its own being, and definitely the processor of a multitude of information. It will become a super being. The building of the light body involves become a super being.

Id.

244. See 1 WALSCH, *supra* note 13, at 39. According to God:

There are those who say that I have given you free will, yet these same people claim that if you do not obey Me, I will send you to hell. What kind of free will is that? Does this not make a mockery of God—to say nothing of any sort of true relationship between us?

Id.

245. See Baron Holbach, *The Illusion of Free Will*, in A MODERN INTRODUCTION TO PHILOSOPHY 10 (Paul Edwards & Arthur Pap eds., 1965) ("Man's life is a line that nature commands him to describe upon the surface of the earth, without his ever being able to swerve from it, even for an instant.").

246. Cf. Bonnie Thorton Dill et al., *Race, Family Values, and Welfare Reform*, in A NEW INTRODUCTION TO POVERTY, *supra* note 35, at 263, 270 (Evelyn Brooks Higginbotham argues that race "speaks about and lends meaning to a host of other terms and expressions, to myriad aspects of life that would otherwise fall outside the referential domain of race. . . . It blurs and disguises, suppresses and negates, its own complex interplay with the very social relations it envelops.").

247. See 2 WALSCH, *supra* note 13, at 83 ("Your popular psychology has termed this energy

which we now assume has always existed as a stable, conserving idea.²⁴⁸ From one agreement comes many, and from the many comes the falsely assumed stability or permanence of a construct.²⁴⁹ At this juncture, people have placed their free will in the service of the state, the powerful, the wealth, and ironically the poor. In this way, people use their free will to support an agreement, an idea that has simply become a socially meaningful *convention*.

Within New Age philosophy, social conventions—or different “realities” competing within properly negotiated and similar linguistic spaces—have not rend free will, the basic consciousness (i.e., energy) through which we all express to some degree the highest concept we have of ourselves, either individually or collectively.²⁵⁰ Despite these social conventions, we continuously co-create manifold personal worlds and social “realities.” As I have already argued, these worlds and realities co-exist more or less within dynamic social spaces, and that an individual’s inner consciousness and our social “realities” do not have separate existences. Yet, in co-creating these worlds and realities, especially while agreements compete for our attention, we learn to deny that a host of probabilities exists by which we can change literally any personal world or social reality.²⁵¹ Accordingly, while we still have free will and while we still remain

Matrix the ‘Collective Consciousness.’ It can, and does, affect *everything on your planet*: the prospects of war and the chances of peace; geophysical upheaval or a planet becalmed; widespread illness or worldwide wellness.”).

248. See ORNSTEIN, *supra* note 233, at 3 (“As we attempt to achieve a stable consciousness, we continuously “bet” about the nature of reality.”).

249. See *id.* at 19. According to Aldous Huxley,

Every individual is at once the beneficiary and the victim of the linguistic tradition into which he has been born—the beneficiary inasmuch as language gives access to the accumulated records of other people’s experience, the victim insofar as it confirms him in the belief that reduced awareness is the only awareness, and as it bedevils his sense of reality, so that he is all too apt to take his concepts for data, his words for actual things.

Id. (quoting ALDOUS HUXLEY, *THE DOORS OF PERCEPTION* (1954)).

250. See 1 WALSCH, *supra* note 13, at 39. According to God,

I have never set down a “right” or “wrong,” a “do” or a “don’t.” To do so would be to strip you completely of your greatest gift—the opportunity to do as you please, and experience the results of that; the chance to create yourself anew in the image and likeness of Who You Really Are; the space to produce a reality of a higher and higher you, based on your grandest idea of what it is of which you are capable.

To say that something—a thought, a word, an action—is “wrong” would be as much as to tell you not to do it. To tell you not to do it would be to prohibit you. To prohibit you would be to deny the reality of Who You Reality Are, as well as the opportunity for you to create and experience that truth.

Id.

251. See 1 ROBERTS, *supra* note 15, at 53. According to Seth:

Such endless creativity can seem so dazzling that the individual would appear lost within it, yet consciousness forms its own organizations and psychic interactions at all

very powerful reality creators, we allow social agreements to focus our purposes, desires, and intent, and by so allowing, we focus on social experiences like poverty, thereby rendering invisible alternative social experiences in which poverty cannot and does exist.²⁵²

Poverty constitutes a focus, an experience that hooks our attention. By giving our attention to poverty, especially in a way that does not view it as a limited, temporary construction, we judge it and the poor. They become undeserving,²⁵³ and in this way we resist becoming one of them. We also make moral judgments about the poor, so that we can conclude that God or some larger force has banished them to a fate worse than yours.²⁵⁴ Unfortunately, by judging, we focus and give attention, and by focusing and giving attention, we lock them and ourselves into a social drama that permits wealth and poverty to co-exist simultaneously. To complete the story, we construct a social industry that reinforces that poverty exists beyond our co-creation.²⁵⁵ This industry perpetuates poverty,²⁵⁶ and by assuming that people fell into poverty because they possess poor values, morality, and work habits, we rationalize wealth as a social good, unless we view extreme wealth as decadent or obscene.

levels. Any consciousness automatically tries to express itself in all probable directions, and does so. In so doing it will experience All That Is through its own being, though interpreted, of course, through that familiar reality of its own. You grow probable selves as a flower grows petals. Each probable self, however, will follow through in its own reality—that is, it will experience to the fullest those dimensions inherent to it.

Id.

252. *See id.* at 53. According to Seth:

Basically, however, the motion of any wave or particle or entity is unpredictable—freewheeling and undetermined. Your life structure is a result of that unpredictability. Your psychological structure is also. However, because you are presented with a fairly cohesive picture, in which certain laws seem to apply, you think that the laws come first and physical reality follows. Instead, the cohesive picture is the result of the unpredictable nature that is and must be basic to all energy.

Id.

253. *See* Dill et al., *supra* note 246, at 271 (According to Michael Katz, “the transition to capitalism and democracy in early-nineteenth-century America [justified] the ‘mean-spirited treatment of the poor’ and [helped] to ‘ensure the supply of cheap labor in a market economy increasingly based on unbound wage labor.’”) (citation omitted); *see also* Franklin, *supra* note 51, at 131 (“The welfare system is indicted beyond its deleterious effects on black women, men, children, work, and learning habits. Blacks are seen as ungrateful cheats who do not care about anything.”).

254. *See* Marlene Kim, *The Working Poor: Lousy Jobs or Lazy Workers*, in *A NEW INTRODUCTION TO POVERTY*, *supra* note 35, at 307 (“Most Americans believe that if one works hard, one should not be poor.”).

255. *See* Jennings, *supra* note 35, at 20.

256. *Cf.* Franklin, *supra* note 51, at 139 (“Conservatives point to soft-headed welfare liberal leaders who have added to the incorrigible behavior of the black underclass by pressuring the public to maintain assistance rather than making blacks look for work.”).

By giving our focused attention to the implied agreements that correlate with poverty, the poor and the rich have lost sight of who they are. They forget that people are powerful reality creators, thus explaining why blacks and whites live in poverty and abundance. Yet, by adopting the simple explanations like culture of poverty, vicious circle, family degradation, sexual deviancy, and genetic explanations, people assume that the wealthy must not have contributed to poverty, and the poor must perforce live with the hand that God dealt them. In this way, we collectively neglect our inner suspicions that people have allowed society and their parents at the very least to simply adopt the dominant social structures that serve as powerful agreements which structure the manner in which we perceive the world. Traditional scholars would call these powerful agreements—"mass cultural consciousness,"²⁵⁷ and they would argue that this consciousness disempowers citizens so that elite interests can continue to dominate the lives of the poor and the ignorant.²⁵⁸

In this essay, mass cultural consciousness and Ruiz's agreements in the process of human domestication serve the same hegemonic role: they encourage us not only to deny the three basic premises of New Age philosophy, but also to accept the idea that we do not participate but simply observe. As such, we must ask: to whom then must we look to overcome the problem of poverty, the underclass, and residential segregation? In *Black Wealth/White Wealth* and *American Apartheid*, Oliver, Shapiro, Massey, and Denton invite us to look to the state and dominant social structures. Without considering policy makers, people who have internalized mass cultural consciousness, the state can implement broad structural programs like "Education and Youth Asset Accounts"²⁵⁹ and

257. Cf. Richard M. Thomas, *Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance*, 62 U. COLO. L. REV. 525, 533-35 (1991). Richard Thomas aptly writes:

One of their most important common themes, based on their shared view of the importance of certain kinds of cultural totality or unitary cultural discourse, is the threat that tolerance may pose to programs, to establish or preserve a preferred cultural totality. Often the critics, both right and left, have operated within what broadly may be called a "mass society" or "mass culture" critique. Mass consumer culture is seen as replacing a genuine culture: for the right, this means the decline of class stability, moral education, and national cohesiveness; for the left, primarily the Frankfurt School, this means the appearance of a new propaganda apparatus by which the interest of capital dominates mass consciousness and blinds individuals to their true collective interests. According to the various versions of the mass culture critique, the rise of mass culture is identified with the decline of "organic community" and the cultural "whole," and the consequent "social atomization of 'mass man.'"

Id. (citations omitted).

258. Cf. ORNSTEIN, *supra* note 233, at 39-40 ("Our 'agreement' on reality is subject to common shared limitations that evolved to ensure the biological survival of the race. All humans may agree on certain events only because we are all similarly limited in our very structure as well as limited in our culture.").

259. OLIVER & SHAPIRO, *supra* note *, at 180-81.

“Housing Asset Accounts”²⁶⁰ or a “National Action”²⁶¹ and greater enforcement by federal authorities.²⁶² In this way, by meditating continuously on “external,” objective reality, by adapting to the idea that this reality operates beyond our active, conscious thinking, talking, and acting, we reject our birthright which is free will, we deny that God lives within us, and we refuse to remember that we are powerful reality creators.²⁶³ In so doing, we act like victims. We then look to scholars like Oliver, Shapiro, Massey, and Denton, who tell us that federal programs like welfare and federal laws can save us from that which we have necessarily co-created. By internalizing what Ruíz calls “agreements,” by adhering to what Talbot calls a “observer” perspective, and by failing to acknowledge Holmes’ principle that “we can attract to ourselves people and things which will obliterate that poverty,” we forget the basics, and we deny our personal power to end poverty and residential segregation.

C. The Core Problem: The Meaning of Race Consciousness

Power comes from inner strength. Inner strength does not come from raw power. In this, most of the world has it backwards.

Power without inner strength is an illusion. Inner strength without unity is a lie. A lie that has not served the race, but that has nevertheless deeply embedded itself into your race consciousness. For you think that inner strength comes from individuality and from separateness, and that is simply not so. Separation from god and from each other is the cause of all your dysfunction and suffering. Still, separation continues to masquerade as strength, and your politics, your economics, and even your religions have perpetuated the lie.²⁶⁴

By race consciousness, it should be clear that *Conversation with God* does not refer to the narrowness, madness of racial identity or ethnicity. In the foregoing quote, race consciousness reinforces the point that I made in the previous section: people have deliberately or by default surrender their angelic humanity to constructs, into which people have invested their individual power and collective psyche. Under this race consciousness, society has become a

260. *Id.* at 181-82.

261. MASSEY & DENTON, *supra* note **, at 234-36.

262. *See id.* at 224 (“Although the 1988 amendments provide tougher penalties against those who violate the Fair Housing Act and make it easier to prosecute discriminators, the basic organization of enforcement still relies heavily on individuals. As long as the Fair Housing Act is enforced by these ‘private attorneys general’ rather than by federal authorities, it is unlikely to be effective.”).

263. SETH, PERSONAL REALITY, *supra* note 4, at 11 (“Basically you create your experience through your *beliefs* about yourself and the nature of reality. Another way to understand this is to realize that you create your experiences through your expectations.”).

264. 3 WALSCH, *supra* note 13.

steward over social realities like poverty, wealth, and residential segregation. Society not only guides and steers these constructs through the labyrinth that is our political system, but also protects them from radical social change. On this point, Massey and Denton write: "the policies we have recommended do not require major changes in legislation. What they require is political will. Given the will to end segregation, the necessary funds and legislative measures will follow."²⁶⁵ In order to protect dominant social structures about poverty, wealth, and residential segregation, we also resist any modest legislative initiative.²⁶⁶ On this point, Massey and Denton write: "For each proposal that is advanced to move the fair housing agenda forward, there are other efforts to set it back."²⁶⁷ Accordingly, in this context, race consciousness reveals that we co-create poverty, wealth, and residential segregation by the means through which we boldly accept that race justifies banishing the poor to their deadly circumstances,²⁶⁸ and by which we knowingly embrace agreements that give us power over the socialized Other (e.g., poor blacks).²⁶⁹

In this way, our race consciousness (e.g., mass cultural consciousness) allows us to think that the poor exist out there. It permits us to conclude that we—all of us—did not deliberately or by default co-create the concept of poverty and wealth. In this conclusion, we can find biases based on morality and work ethic. The poor cannot get that for which they will not work. The poor lack a real religious foundation. With our race consciousness, we falsely comfort ourselves that our thinking, talking, and acting bear no relationship to the manner in which we endorse our social logic. We retreat to the following rationalization: *Poverty existed before I was born, and it will be here long after I am gone; I better get mine while the getting is good.* We use our race consciousness to disconnect from the personal worlds and social realities in which other spiritually based angelic humans must live too.

Our race consciousness also reveals the manner in which we connect to the spirituality, God, Goddess, All There Is. This spirituality exists within us, and I noted in the foregoing section, one of New Age's basic principles is that God lives within each of us. Accordingly, by spirituality, I do not mean institutional or organized religions, all tools of mass culture in which people surrender their co-creative power to political agents who cannot imagine a world in which organized religion does not exist.²⁷⁰ Without this spiritual connection, race

265. MASSEY & DENTON, *supra* note **, at 234.

266. *See id.* ("But political will is precisely what has been lacking over the past several decades, and resistance to desegregation continues to be strong.")

267. *Id.*

268. *See* George, *supra* note 40, at 197 (Charles Murray "in fact, announces that he is ready to abandon a sizable portion of [the black underclass] to its unpleasant fate.").

269. *See, e.g.,* Jennings, *supra* note 35, at 19 ("Gilder suggests that the poor have a depraved morality that society can rectify by using draconian measures to punish and imprison the recalcitrant poor for a behavior considered negative by middle-class society.").

270. *See* 1 WALSCH, *supra* note 13, at 154-55. According to Walsch, God writes:

[When what people tell you conflicts with what you feel intuitively, where do you

consciousness means that we not only reject our basic goodness and love, but also embrace political power, racial and gender oppression, separation and isolation, brute individualism and private profiteering, personal and familial dysfunction, fear and distrust, war and violence over peace and reconciliation, judgment over acceptance, suffering over healing, impotence and irresponsibility over autonomy and agency. Without this spiritual connection, we live at a lower, human consciousness. On this point, Ken Keyes writes:

[With lower human consciousness], the young child uses ego mechanisms backed by hair-trigger emotions to develop security, sensation, and power magnification of the moment[-]to[-]moment sensory inputs. Our personal development into fulfilling, happy lives (as well as the progression of civilization beyond the dangerous power consciousness) depends on our getting free of our ego-backed, subject-object, me-them, security-sensation-power hang-ups.²⁷¹

Under this lower race consciousness, society needs poverty, wealth, and residential segregation. Our current social, political, and economic institutions stand on these constructs, ones that allow the wealthy to have “security, sensation, and power magnify[ed]” by the depths of their dollars, by the diversity of their investment portfolios. By having this disconnect from our spirituality, our society and our parents can hook our attention so that we fail to realize that this race consciousness creeps slowly, but indelibly, into our personal constitutions. Few, if any of us, can sincerely imagine ourselves without this form of race consciousness operating either explicitly or implicitly as our cosmological backdrops.

Historically, society has used this race consciousness in laudable ways. This consciousness asked us to dream, aspire, and imagine a new prosperous world; furthermore, it provides social, political, and economic space so that we realize these dreams, aspirations, and imaginations. By this consciousness, great inventions and innovations have been borne. Equally important, the Constitution invokes a negative liberty, in which the state cannot infringe upon a citizen’s rights unless the state has a compelling reason, legitimate goals, and a rational basis for interfering with or classifying citizens in a way that undermines their

go?] The first place you go is to your religionists—the people who put you there in the first place. You go to your priests and your rabbis and your ministers and your teachers, and they tell you to *stop listening* to your Self. The worst of them will try to *scare* you away from it; scare you away from what you intuitively *know*.

They’ll tell you about the devil, about Satan, about demons and evil spirits and hell and damnation and every frightening thing *they* can think of to get *you* to see how what you were intuitively knowing and feeling was *wrong*, and how the only place you’ll find any comfort is in *their* thought, *their* idea, *their* theology, *their* definitions of right and wrong, and *their* concept of Who You Are.

Id. (emphasis in original).

271. KEYES, *supra* note 38, at xv.

liberty interest,²⁷² viz., freedom.²⁷³ With this Constitution, this consciousness cloaks these inventions and innovations with protections so that we may profit from the ingenuity on which we relied to benefit our society.²⁷⁴ In the absence of federal copyright and patent protections, states rely on statutory and common law regimes to shield human energies, capital, and materials from illegitimate business practices.²⁷⁵ To this extent, a race consciousness that embraces this principle of individuality and separation can yield positive, noteworthy ends for society.

Nevertheless, society uses this race consciousness deliberately or by default to co-create poverty, wealth, and residential segregation. As *Conversation with God* points out, our race consciousness operates so insidiously within our cognitive field. Let us consider *Black Wealth/White Wealth* and *American Apartheid*. We know that racialized wealth inequality and persistence segregation and the making of the underclass have historic origins. When Oliver and Shapiro discuss the role of slavery and Jim Crow politics in the wealth inequality of blacks and when Massey and Denton critique the persistence of residential segregation and its role in the development of the urban underclass, they directly implicate this race consciousness. Slavery, Jim Crow, the Federal Housing Authority, and the HOLC internalized white fear, and these state-sponsored policies must have been premised on the idea that whites and blacks not only originated from different human species,²⁷⁶ but also live different social and personal lives.²⁷⁷ Race consciousness privileges this personal and social agreement.

Notwithstanding this race consciousness, a New Age approach depends on both individual agency and a broad spiritual connection between all angelic humans. A New Age approach promotes individual centered self-actualizing philosophy. It also locates the individual in social practices and cultural norms.

272. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Slaughter-House Cases*, 83 U.S. 36 (1873). See also Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1295 (1982); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949).

273. See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

274. See, e.g., *Int'l News Serv. V. Associated Press*, 248 U.S. 215 (1918).

275. See, e.g., *Texon Drilling Co. v. Elliff*, 210 S.W.2d 558 (Tex. App. 1948).

276. See J. H. Van Evrie, *White Supremacy and Negro Subordination*, in DOCUMENTS OF AMERICAN PREJUDICE, *supra* note 23, at 291.

The Negro is a different being from the white man, and therefore, of necessity, was designed by the Almighty Creator to live a different life, and to disregard this—to shut our eyes and blindly beat our brains against the decree—the eternal purpose of God himself, and force this negro to live *our* life, necessarily destroys him, for surely human forces can not dominate or set aside those of Omnipotence.

Id. (excerpted from J. H. VAN EVRIE, M.D., *WHITE SUPREMACY AND NEGRO SUBORDINATION* 312-20 (Horton & Co. 1868)).

277. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *The Civil Rights Cases*, 109 U.S. 2 (1883).

These approaches do not conflict because a New Age philosophy premises itself on the idea that each of us lives interdependent and interconnected spiritual lives. None of us is ever disconnected from a larger, spiritual cosmology.²⁷⁸ Accordingly, a New Age approach embraces a holistic, organic perspective, never placing social practices and cultural norms outside and independent of individual choices and mental focus. This approach begins and ends with the central idea that people co-create all personal experiences and social realities. Poverty falls within this approach. Consider the following:

First, it is not merely a question of those who *want* to “work hard” and those who don’t. That is a simplistic way to cast the argument (usually constructed in that way by the “haves”). It is more often a question of opportunity than willingness. So the real job, and the first job in restructuring the social order, is to make sure each person and each nation has equal *opportunity*.²⁷⁹

While our social contract prompts the idea of equal opportunity, our current race consciousness also markets personal and social agreements so that some citizens fear success; they fear “acting like whitey.”²⁸⁰ By placing everyone (or every “group”) at the center of all personal and social experiences, and by reminding everyone that he or she never loses a connection to a larger, First Cause, even if he or she has internalized the state’s or parent’s agreement, a New Age approach to poverty merges individual intent with social realities. Neither simply exists without the other. Yet, this merging does not negate individual choice and self-expression. By taking this obviously unfragmented approach to the manner in which we use race consciousness to co-create and maintain poverty, wealth, and residential segregation,²⁸¹ a New Age philosophy empowers all angelic humans. Once empowered, we can responsibly proffer large segments of our society not the “equal achievement” for which Oliver and Shapiro argue, but the equal

278. 1 WALSCH, *supra* note 13, at 197 (“Your body, your mind, and your soul (spirit) are one. In this, you are a microcosm of Me—the Divine All, the Holy Everything, the Sum and Substance. You see now how I am the beginning and the end of everything, the Alpha and the Omega.”). See JERRY HICKS & ESTHER HICKS, *ABRAHAM SPEAKS—A PERSONAL HANDBOOK TO ENHANCE YOUR LIFE, LIBERTY, AND PURSUIT OF HAPPINESS: NEW BEGINNING II* 41 (1996) (“Every part of your physical world is, and always has been, supported by that which is non-physical.”) [hereinafter cited as HICKS & HICKS, *ABRAHAM SPEAKS II*].

279. 2 WALSCH, *supra* note 13, at 197.

280. See, e.g., Lynette Clemetson, *Trying to Close the Achievement Gap (African Americans Work Harder for Academic Achievement in Shaker Heights, Ohio)*, *NEWSWEEK*, June 7, 1999, at 36 (“Then there is peer pressure. Most teens at Shaker say they do not buy the old line that doing well means selling out to white culture. ‘What, only white people study?’ says junior Justin Taylor. ‘That’s just plain stupid and insulting.’ But if student don’t catch flak for ‘acting white,’ they faced mixed messages about what it means to ‘act black.’”).

281. See DAVID BOHM, *THOUGHT AS A SYSTEM* 3 (1992) (“One of the obvious things wrong with thought is *fragmentation*. Thought is breaking things up into bits which should not be broken up.”).

opportunity²⁸² by which individual dreams, desires, and aspiration can bear fruit.²⁸³ Equally important, we can co-creatively choose a race consciousness, in which the social "reality" from among the many the probable ones on which we might focus dignifies and honors all angelic humans.²⁸⁴

D. Spirituality: Privileging Experience over Self-Denial, Self-Destruction

In New Age philosophy, race consciousness operates on two levels: human consciousness driven by hair-trigger emotions, power seeking, sensation collecting, security doubting personalities, and racialized identities conditioned white superiority over black inferiority, *and* black poverty based on immorality, laziness, promiscuity, and the absence of middle-class values. Despite these levels of meaning, race consciousness exists co-extensively with spirituality. Each lives without meaningful distinction. Above all else, spirituality represents a state of being, one that centers this philosophy. Spirituality refers to a state of mind, a mind that relates self-consciously to God. It is an equal relationship, humans and God. And as in life, it is a relationship without obligations. Despite the manner in which race consciousness (e.g., agreements or mass culture) socializes us to co-create poverty, wealth, or residential segregation, our essential Self can still choose differently. We have absolute freedom.²⁸⁵ With this absolute freedom, we can focus on a self-empowering philosophy like New Age or a victim-centered race consciousness. Regardless, we can still choose to co-create poverty, wealth, or residential segregation. Yet, by adopting a self-empowering philosophy, one can deliberately choose to experience poverty or wealth. In so doing, she does not blame anyone else for the manner in which she experienced her creations. She recognizes that she is a very powerful reality creator. By adopting a victim-centered theory, he can co-create poverty, wealth, or residential segregation by default. Not realizing why he cannot keep or attain material abundance, he blames the world, faulting either *white racism* emanating from a history of slavery and Jim Crow laws or *racial quotas* flowing from civil

282. *Id.* at 5 ("The more general difficulty with thought is that thought is very active, it's *participatory*.").

283. See CONLEY, *supra* note 100, at 7 ("[E]quality of opportunity. Under this concept, equality would be achieved if each individual in a society enjoyed the right to compete in a contest unimpaired by discrimination of any kind.").

284. 3 WALSCH, *supra* note 13, at 150. Consider the implications of acceptance.

Enlightenment begins with acceptance, without judgment of "what is." . . .

This is known as moving into the Isness. It is in the Isness where freedom will be found.

What you resist, persists. What you look at disappears. That is, it ceases to have its illusory form. You see it for what it is. And what is can always be changed. It is only what is Not that cannot be changed. Therefore, to change the Isness, move into it. Do not resist it. Do not deny it.

Id.

285. *Id.* at 137.

rights laws.²⁸⁶ According to Abraham,

By virtue of powerful Universal Laws, you receive all things. Whether you have an abundance of dollars or lack of them, an abundance of health or continual sickness, satisfying, fulfilling relationships or difficult and unsatisfying relationships, is determined by the way you, as an individual, apply the Laws of the Universe. Without exception you are applying the Laws, for without exception you are the creator of this physical experience.²⁸⁷

By racializing our experiences, we rely on a *race* consciousness that renders us victims, and in so doing we reject our spirituality. By acknowledging that consciousness and spiritual are living energy, we can begin to understand that each operates, whether we acknowledge the principles, according to the Law of Attraction.²⁸⁸ What is this Law? "That which is like unto itself is drawn."²⁸⁹ By embracing this Law, even if we reject spirituality, we can still choose to co-create from positive thinking, talking, acting, and emotions.²⁹⁰ In effective, each person can co-create anything into his or her personal experience. By knowingly combining spirituality and absolute freedom, one can deliberately and joyously embark on material abundance without praising favorable social policies or without damning regressive social welfare programs. Nevertheless, this spirituality and absolute freedom do not lead perforce to social anarchy. Rather, we can deliberately combine them to co-create *opportunity*.²⁹¹

In New Age philosophy, opportunity means the absence of obligations. One of the basic tenets of New Age thinking is free will. Obligations mock free will. "*Opportunity, not obligation, is the cornerstone of religion, the basis of all spirituality. So long as you see it the other way around, you will have missed the*

286. See HICKS & HICKS, ABRAHAM SPEAKS II, *supra* note 278, at 70 ("The predominant emotional state of most biological beings is that of negative emotion. Therefore, the predominant experiences that he attracts into his experiences are also negative, for from his negative position he perpetuates more negative.").

287. *Id.* at 78.

288. See HICKS & HICKS, ABRAHAM SPEAKS I, *supra* note 6, at 17 ("Once one of your beliefs has surfaced, that belief, or thought—for a belief is nothing more than a thought that you have thought before, that you continue to think—that thought will attract other thoughts that are like it. it is what we call the 'Law of Attraction.'").

289. HICKS & HICKS, ABRAHAM SPEAKS II, *supra* note 278, at 81.

290. See *id.* at 82. Abraham writes:

The Universe is responsive only when harmony exists. In clearer terms: When you think of something you do not want, cancer, for example, and you feel the negative emotion that you term "dread" or "fear," you have harmony—and that cancer is on its way into your existence. When you think of something you do want, perfect health, for example, and you feel the positive emotion of "peace" and "joy," you have harmony—and that perfect health is on its way into your experience.

Id.

291. See 1 WALSCH, *supra* note 13, at 137.

point.”²⁹² Accordingly, society cannot force rich citizens to share their wealth with poor ones, and when society requires sharing through taxes (and other wealth transferring mechanisms), the wealthy resent the fiscal intrusion.²⁹³ Equally important, the poor too will reject liberal welfare programs, especially those that through confiscatory taxes appear to impose on his future dream to material abundance.²⁹⁴ Likewise, when our society enacted the *Fair Housing Act of 1968*,²⁹⁵ racial discrimination in housing markets that fell within its scope was outlawed.²⁹⁶ Despite the Fair Housing Act, courts still act to ensure that blacks, whites, and others can live harmoniously together.²⁹⁷ Nevertheless, *obligations* do not work.

Because obligations do not work, society cannot impose its will on citizens until they learn that *race* consciousness and racism injure all people. I do not mean to suggest that the United States Supreme Court should not have decided a case like *Brown v. Board of Education*.²⁹⁸ Yet, even the United States Supreme Court recognized that lower district courts would need time to work through the depth of racial ignorance and hatred. In 1955, it granted breathing room for this gradual change in “race” consciousness with its “all deliberate speed” injunction.²⁹⁹ Accordingly, society, especially if it is guided by enlightened minds, must enact empowering legislation so that each of us has real, equal opportunities, and at the same time, society must also develop empowering approaches for those citizens who can release their singular commitment to race consciousness, racism, and self hatred.

So what works? *Experience* works.³⁰⁰ None of us gets sufficiently positive, interpersonal experiences with each other if blacks suffer hypersegregation in isolated urban areas. None of us has an opportunity to overcome our apparent differences, and to this extent, we must view racial segregation, especially given the depth to which Massey and Denton suggested that the problem exists, as singularly the most pernicious impediment to racial harmony. Racial segregation allows whites to resist releasing race consciousness and racism by retreating farther outside the steady movement of black out-migration patterns. When the United States Supreme Court denied the City of Detroit the right to use annexed school districts, it slowed the rate at which highly complex interpersonal social

292. *Id.* (emphasis in original).

293. See THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1991).

294. See Derrick Bell, *Racism: A Major Source of Property and Wealth Inequality in America*, 34 IND. L. REV. 1261 (2001).

295. See 42 U.S.C. §§ 3601-3619, 3631 (2000).

296. See *id.* §§ 3604-3605.

297. See, e.g., *United States v. Starrett City Assoc.*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988).

298. 347 U.S. 483 (1954).

299. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

300. See HICKS & HICKS, ABRAHAM SPEAKS II, *supra* note 278, at 53 (“As teachers, we have learned, long ago, that words do not teach. Learning comes through life experience.”).

experience could have begun sooner than later to ameliorate the resistance by white adults.³⁰¹ With the end to racial segregation, we begin to recognize that experience informs us on self-evident levels that blacks and whites seek the same degree of recognition, a kind of connection that operates within all of us through Spirit.

By living through race consciousness and racism, we engage in *self-denial*, leading invariably to *self-destruction*. In *Black Wealth/White Wealth*, Oliver and Shapiro detailed the manner in which the state developed policies to ensure white asset accumulation opportunities over black.³⁰² In order to ensure that blacks did not compete successfully with white economic interest, organized violence became an effective tool. In *American Apartheid*, Massey and Denton detailed this use of extra-legal means to guarantee white privileges.³⁰³ Sometimes, this violence led to unspeakable horrors with blacks suffering lynchings and live burnings. During the civil rights movements, whites bombed a church, killing small children. Years later, some of these men suffered federal prosecution. Now, it is viscerally clear that murder is wrong, race notwithstanding. Prior to these prosecutions, the killer of civil rights activists Medgar Evers was successfully prosecuted. Consider further Governor George Wallace who publicly denounced racial integration and who may have privately regretted playing such a role in reinforcing our lower race consciousness.

Race consciousness and racism invite this kind of *self-denial* and allows us instead to dismiss what we intimately and internally feel to be true. By so denying our natural instincts, we lose touch with these urges and, with increasing regularity, begin to believe that "racism" works for the advancement of society's favored. All of us, even those who defensively subscribe to a black consciousness, contribute to this self-denial. Wealth disparity confirms this loss of self, and it reassures those who have benefitted from sedimentation of inequality that whites must be the superior race. Racial segregation provides similar comfort for those who look disparagingly on the urban poor. By relying on wealth disparity or racial segregation as a basis for ignoring the manner in which we divorce ourselves not only from a spiritual life, but also from each other, we refuse to accept personal responsibility. Absolution of responsibility leads to the rejection of any agency in the manner in which blacks, whites, and others have co-created poverty, wealth, and residential segregation.

E. Personal Responsibility: Agency and Co-Created Realities

In New Age philosophy, one of the center tenets is personal responsibility. In recent legal and political discourse, personal responsibility has been used to

301. See *Milliken v. Bradley*, 418 U.S. 717 (1974) ("Boundary lines may be abridged where there has been a constitutional violation calling for interdistrict relief, but, the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.").

302. See OLIVER & SHAPIRO, *supra* note *.

303. See MASSEY & DENTON, *supra* note **.

varying degrees to frame who should get help, who deserves help, and who qualifies for help. Without altering, its core meaning, the New Age concept of personal responsibility could be easily borrowed by conservatives and liberals, even if both political groups pursue different social ends. Under New Age philosophy, responsibility means that we have total "responsibility for all things that are taking place in [our] life."³⁰⁴ This tenet contends that we know at some intuitive level that we planned to allow certain experiences into our lives. It does not presuppose that each of us must do a given thing. Rather, we can do anything because we "are not predestined to do anything."³⁰⁵

This New Age concept of responsibility inextricably links itself to agency, autonomy, and choice. At base, by conjoining responsibility and agency with non-predestination, it follows that we only experience that which we choose to co-create. We are not destined to experience a given event. To this degree, we co-create our lives moment to moment.³⁰⁶ At the very least, this concept suggests that we co-create either deliberately (or living conscious action) or by default (or living unconscious reaction).³⁰⁷ As such, this concept appears to comport with cause and effect.³⁰⁸ Unfortunately, cause and effect does not truly exist.³⁰⁹ Our thoughts, specifically focused, emotionally clear ones, co-create our personal experiences and manifold social realities. In so doing, I can affect my personal experiences, my social realities. I cannot co-create for others, unless they have had their attention firmed "hooked" and they have adopted as their own my dreams, desires, and aspirations. As such, nothing ever victimizes us, at least not without our permission.³¹⁰ To be victims, we must embrace the idea that we do not have choices.³¹¹ We must adopt the notion that we do not have free will. We

304. 3 CARROLL, *supra* note 7, at 74.

305. *Id.*

306. See 1 ROBERTS, *supra* note 15, at 54 ("Consciousness, to be fully free, had to be endowed with unpredictability. All That Is had to surprise himself, itself, herself, constantly, through freely *granting itself its own freedom*, or forever repeat itself. This basic unpredictability then follows through on all levels of consciousness and being.").

307. See HICKS & HICKS, ABRAHAM SPEAKS I, *supra* note 6; 2 WALSCH, *supra* note 13, at 13.

308. See ROBERT H. HOPCKE, THERE ARE NO ACCIDENTS: SYNCHRONICITY AND THE STORIES OF OUR LIVES 26 (1997) (describing synchronicity as "the simultaneous occurrence of two meaningful but not casually connected events").

309. See *id.* at 27. Robert Hopcke writes:

[C]ausal thinking seduces us into an illusion of complete power over our surroundings and enhances our sense that we are in control of our destiny, a vision quite flattering to our own egos. Cause-and-effect thinking enables us to feel in control, to split ourselves off from the world "outside" and operate upon it. In this causal worldview, we are limited only by the consequences of our actions, but if we accept the consequences of our actions, then act we may, and freely.

Id.

310. 3 CARROLL, *supra* note 7, at 75.

311. SETH, PERSONAL REALITY, *supra* note 4, at xvii ("Each thought has a result, in your terms. The same kind of thought, habitually repeated, will seem to have a more or less permanent effect.

must subscribe to race consciousness, an agreement that requires us to surrender our birthright as a powerful reality creator. Instead, we choose to make others responsible for our choice to use drugs, for our desire to steal, for our aspiration to have power over others, for our dream to live in poverty.³¹² Even though we live in a social context, one of our own making, we must deliberately or by default surrender our agency, autonomy, and choice. By so surrendering, we allow critical moments, although not perennially lost ones, to “pass.” Within New Age philosophy, it is at this critical moment that we can choose to diminish extremes in wealth, eradicate poverty, or end residential segregation. President Roosevelt’s *New Deal*, and President Johnson’s *War on Poverty*, and President Bush’s *Educational Reform* mark these kinds of critical moments. New Age philosophy strongly embraces this idea of personal responsibility, agency, autonomy, and choice.

By allowing critical, co-creating moments to “pass,” we deny that we can overcome *race* consciousness. We also refuse to end poverty and residential segregation. In so doing, we fuel scarcity, heightening our need for security, for money, for love, and for acceptance. This race consciousness lives within our collective consciousness. None of us can lay claim to innocence, especially due to racial differences. Thus, we always need constant meals of political power, economic dominance, personal aggression, violence, oppression, racism, ignorance, dependence, victimization, and gender conflicts. Yet, we can never satisfy these needs. It is a spiritual disquiet, one that mentally replays our doubts of the new and our fear of the living now. Unfortunately, we cannot see this disquiet, this race consciousness. However, despite its apparent invisibility, we express it by co-creating the homeless, the ignorant, the poor, the economic elite, the segregated white and the isolated black. In this way, we build icons to this deity daily, and we pay homage to it. We pay with old money, a form of currency that still lingers from our distant past, *viz.*, race oppression, gender dominance, class conflicts, in which the change from this human dollar amounts to lost opportunity, to wasted lives. As such, this race consciousness has an emotional, psychological, physical, and mental needs that will prove bottomless.

With a *spiritual* consciousness that maintains a spirituality, that recognizes its own agency, that appreciates how thinking and emotions co-create reality, that accepts our victimless roles in our personal worlds and manifold social realities, we would use our assets so that all of us had sufficient stores, so that social life and economic survival were absolute guarantees. Thereafter, if we wish to use our individual talents to acquire more assets, our society should acknowledge both talents and the rewards, so long as our social constitution protected the principle of universal social life and economic survival. Until we usher in that day, our current race consciousness will reproduce political experiments and co-

If you like the effect then you seldom examine the thought. If you find yourself assailed by physical difficulties, however, you begin to wonder what is wrong.”).

312. *Id.* (“[R]egardless of what you have told yourself thus far, you still do not believe that you are the creator of your own experience. As soon as you recognize this fact you can begin at once to alter those conditions that cause you dismay or dissatisfaction.”).

create manifold social realities in which a few of us have great wealth and most of us live in abject poverty.

III. POVERTY: RACIALIZED STRUCTURES WITH CO-CREATING SUBJECTS

Black Wealth/White Wealth and *American Apartheid* really represented truly important, well-told sociological narratives. Apart from Melvin Oliver and Thomas Shapiro's deliberate focus on wealth and Douglas Massey and Nancy Denton's on hypersegregation and on the way private white prejudice conjoined with black isolation, these sociological narratives felt like other great historical or sociological tales that looked to historical and social structures. Through this review essay, my point has been a simple one: these authors removed, and thus greatly diminished, the role that blacks, whites, and others have played co-creatively in these very powerful sociological narratives.³¹³ In making this point, *Black Wealth/White Wealth* and *American Apartheid* still contributed vitally and helped us understand the seamless complexity of underclass poverty, racialized wealth, and hypersegregation.

However, by relegating these powerful reality creators to the margins, we only learn that the state, financial institutions, real estate brokers, housing markets, infrastructural developments, and organized violence and harassment converged to intensify poverty, to weaken integration, and to isolate blacks. Unfortunately, when we read these sociological narratives from this perspective, we comfortably forget that we fueled these policies, violence, and isolation by our race consciousness.³¹⁴ We also refuse to acknowledge that blacks too were unwilling to live in all-white communities, which rejected the idea that they should be willing to be the first black family to integrate these communities. When we combine these feelings, attitudes, and thoughts, we find powerful co-creative energy that fueled a collective idea that blacks and whites should live in segregated communities. In *Black Wealth/White Wealth* and in *American Apartheid*, we sleep past the possibility that blacks and whites co-created not only the personal worlds in which neither trusted the other, but also the manifold

313. Cf. Schlag, *supra* note 201, at 1627; see also David S. Caudill, *Pierre Schlag's "The Problem of the Subject": Law's Need for an Analyst*, 15 CARDOZO L. REV. 707 (1993).

314. MASSEY & DENTON, *supra* note **, at 49. Massey and Denton write that:

The universal emergence of the black ghetto in American cities after 1940 rests on a foundation of long-standing white racial prejudice. Although attitudes cannot be studied directly before 1940, after this date opinion polls are available to confirm the depth of white prejudice against blacks in the area of housing. In 1942, for example, 84% of white Americans polled answered "yes" to the question "Do you think there should be separate sections in towns and cities for Negroes to live in?"; and in 1962, 61% of white respondents agreed that "white people have a right to keep blacks out of their neighborhoods if they want to, and blacks should respect that right." It was not until 1970 that even a bare majority of white respondents (53%) disagreed with the latter statement.

Id.

social realities in which blacks and whites shared similar and different attitudes about racial integration.

Yet, in working to understand poverty, wealth, and racial segregation from a New Age perspective in which we co-create our personal worlds and manifold social realities, *Black Wealth/White Wealth* and *American Apartheid* represented radically traditional sociological narratives. Neither book truly raised blacks above the victim status. In *Black Wealth/White Wealth*, Oliver and Shapiro discussed economic detours, in which they cast blacks as business-minded entrepreneurs and as victims of a racialized system that denied them access to markets on which immigrant entrepreneurs have historically relied. Once again, blacks get victimized by a racialized state determined to privilege white interests over others' interests, including those of blacks. This racialized system guaranteed income and asset accumulation opportunities for whites. Can we appreciate these historically racist practices without reinforcing that blacks, despite their courageous ventures, were victimized then and today?

Likewise, in *American Apartheid*, Massey and Denton differed little from Oliver and Shapiro, when they too viewed blacks not only as brave middle-class believers in integration, but also as innocent victims of white prejudice and entrenched institutional racism. In these narratives on wealth, poverty, and racial segregation, blacks play no role in co-creating a social reality that contributes to racial oppression.

In *Black Wealth/White Wealth* and *American Apartheid*, blacks have become the absent subjects/agents who do not have the power to co-create a different future.³¹⁵ Rather, they must rely on the federal authorities and the white communities' commitment to end racialized wealth and racial segregation. Unfortunately, in an effort to be compassionate liberals, Oliver, Shapiro, Massey, and Denton cannot imagine *re-presenting* these historical and sociological narratives in any way that weakens the strangle hold that victim category holds over black life and their day-to-day choices.³¹⁶

How are these excellent sociologists conditioning us to explain black success?³¹⁷ Would black success, especially a rags-to-riches story, get cast as an

315. See generally Robinson, *supra* note 7, at 283-87 (discussing the problem of the subject/agent and the co-creation of racial realities). See also *Justice, If Such a Thing Exists*, in *DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA* 125, 143-44 (John D. Caputo ed., 1997).

316. Cf. SLEEPER, *supra* note 42, at 4. Although I do not intend to call Oliver, Shapiro, Massey, and Denton liberal "racists", consider the manner in which Sleeper portrays such liberals. Sleeper writes:

[L]iberal racism patronizes nonwhites by expecting (and getting) less of them than they are fully capable of achieving. Intending to turn the tables on racist double standards that set the bar much higher for nonwhites, liberal racism ends up perpetuating double standards by setting the bar so much lower for its intended beneficiaries that it denies them the satisfactions of equal accomplishments and opportunity.

Id.

317. See ELLIS COSE, *COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD* xiii

aberration? This story deviates from what?—our thoughts about personal worlds and social realities? Who constructed these thoughts anyway? As I have already argued, each of us does influence others, and in so doing, we may engage in self-denial and perforce adopt self-destructive life patterns. Nevertheless, we still co-create, except we use the ideas that come to be called mass culture or the collective consciousness. How would we retell the story of black poverty? What if a person attempts to rise above the poverty into which she was born and fails? Would we say that she dreamed too big? Would we say that she could not truly imagine herself educated, employed, or drug-free? Would we candidly conclude that the white man will never allow a black person to succeed? And with this conclusion, we can comfortably mark blacks as prey for a white racist system that, without any active prompting from evil white men, will simply make it impossible for even well-trained, highly educated blacks?³¹⁸ How many times have you heard a statement like this one: “A black person must be twice as good as the white man just to get the job, and he must work twice as hard as the average white person just to get ahead”? Do these propositions describe a social reality? Or do they reinforce a social reality? Or do they co-create it? And if so, do blacks co-creatively make their personal worlds and manifold social realities, especially worlds and realities they would rather prefer to avoid?

In *The Matrix*,³¹⁹ the Oracle tells Neo not to worry about the vase, and as she eases him through what she appears to presage, Neo breaks the vase. When Neo asked the Oracle how she knew, she replies: “What’s really going to bake your noodle later on is would you still have broken it if I hadn’t said anything?” By re-inscribing blacks either as victims or as marginal players in the manner in which our social realities move, are we conditioning blacks to think of themselves as spiritually impotent or as socially irrelevant?³²⁰

When we consider *Black Wealth/White Wealth* and *American Apartheid*, do these compassionate liberals imagine themselves to be subjects/agents who co-create their personal worlds and manifold social realities? It appears they imagine themselves different from the blacks about whom they write. In these books, blacks suffered in a world of white racism, in which a white racial state policy denied them equal asset accumulation opportunities, plunged them into intense poverty, and refused them access to all-white communities. Even if they managed to become homeowners in these communities, they still would experience isolation. Are Oliver, Shapiro, Massey, and Denton subjects/agents because they can name a black victim’s social reality? By not imagining blacks as powerful reality creators in the making and ending of poverty and residential segregation, these liberal scholars confess that they too take refuge in the single idea that they cannot be more than pencil-neck, paper-peddling academic warriors. Unfortunately, they do not realize that through their sociological

(1997) (describing the life of Mrs. Ada Lois Sipuel Fisher, a Langston College honor graduate, who persisted in her effort to matriculate at the University of Oklahoma Law School in the 1940s).

318. See generally ELLIS COSE, *THE RAGE OF THE PRIVILEGED CLASS* (1995).

319. *The Matrix* (Warner Bros. Pictures 1999).

320. See Robinson, *supra* note 17, at 145.

narratives, they have reinforced the idea that the poor and the oppressed need them.

CONCLUSION

It doesn't matter. It doesn't make any difference. No big deal. I didn't like that, but so what? What happened was really unfair, but it doesn't matter now. That doesn't have anything to do with where I am now. It really doesn't matter.³²¹

Neither *Black Wealth/White Wealth* nor *American Apartheid* accepted the idea that we can change our historically derived points of view. Although both books prescribed what it would take to create material equality between blacks and whites and to end residential segregation, neither book positioned blacks or minorities in the center of the human chemistry that co-created the social and economic inequalities in the first place. As such, both books relegated the co-creative subject to historical footnotes and partially interesting marginalia. Unlike Oliver and Shapiro and Massey and Denton, I think that we can re-imagine ourselves as the powerful reality creators. In this case, we become subjects/agents. Despite the powerful sociological narratives that *Black Wealth/White Wealth* and *American Apartheid* represented, they described blacks and whites as action figures, all of whom were posed by the deft hand of social structures. In these narratives, we looked at whites as racists and wrongdoers, failing to see them for what they are—angelic humans working through social experiments, some wonderfully successful, some dangerously wrong.

Unfortunately, by focusing us not on a dynamic interplay between individual consciousness and manifold social realities, especially when we seek to change wealth, poverty, and residential segregation, *Black Wealth/White Wealth* and *American Apartheid* invited us to react to a social structure that appeared beyond our collective responsibility. To the extent that social structures loom over us, rendering most of us to paralysis, individuals can control their personal worlds and the manner in which they experience them. In the aggregate, these individual form a critical mass, and then they change what initially appeared to history's runaway train. However, by simply reacting, we signal our usual, but discomfiting, impotence to change who we really are. In part, we remain in this stagnant place because we do not realized that reactions enslave us to our tragically suffering minds. Our current race consciousness conditions us to react, to be victims. It is unfortunate that by now we do not realized that we co-created poverty, wealth, and residential segregation. We did it! We can change, unless we decide to keep these constructs.

In this regard, consider God's perspective on how reactions do not free but bind. According to God,

Reaction is just that—an action you have taken before. When you “re-act,” what you do is assess the incoming data, search your memory bank

321. *Are You Letting It In?*, reprinted in 16 SCI. DELIBERATE CREATION 6, 44 (2001).

for the same or nearly the same experience, and act *the way you did before*. This is all the work of the mind, not of your soul.³²²

More than limiting us to past experiences, reacting conditions us to live not by choice (i.e., conscious empowerment), but by chance (i.e., unconscious disempowerment). "A life lived by choice is a life of conscious action. A life lived by chance is a life of unconscious reaction."³²³ In the former case, a person lives in the here and now, goes with the flow and allows emotions to dictate what happens next. In the later case, a person lives in the past, fearing old mistakes, old recriminations, or old embarrassments, avoids pain, judgment, and death, with one's reputation and possessions intact. By living consciously, we decide quickly. We choose rapidly. We allow our souls to co-create out of our present experiences only. We do not review. We do not analyze. We do not criticize past encounters.³²⁴ At base, we should live now.³²⁵

One branch of Critical Legal Studies arguably embraces this New Age perspective. It argues against the idea that the governmental system and its institutions depend naturally and neutrally on the ideology of traditional legal reasoning, a process that stands on objective criteria and that originates out of rational thinking.³²⁶ In addition to rejecting legal "determinacy, objectivity, and neutrality" and to asserting the principle of legal indeterminacy (in a word, nihilism), Joseph Singer argues for a legal theory that empowers society from "outworn vocabularies and attitudes."³²⁷ This liberating, empowering legal theory should enable us to ground our intuition and to rely on present customs.³²⁸ Like the New Age proposition that extols a life of conscious action, Singer argues that:

Everyone has had the experience of making important, difficult moral decisions. And almost no one does it by applying a formula. When people decide whether to get married, to have children, to go to law school, to move to another state, to quit their jobs, they do not apply a theory to figure out what to do. They do not "balance all the factors" or add up the pros and cons. In short, they do not follow a procedure that generates, by itself, an answer. . . . and in the end, they make a decision. And later, in looking back at it, they are sometimes pleased with their

322. 2 WALSCH, *supra* note 13, at 13 (emphasis in original).

323. *Id.* (emphasis deleted).

324. *See id.*; *see also* D.T. SUZUKI, AN INTRODUCTION TO ZEN BUDDHISM 35 (1964) ("Zen is mystical. This is inevitable, seeing that Zen is the keynote of Oriental culture; it is what makes the West frequently fail to fathom exactly the depths of the Oriental mind, for mysticism in its very nature defies the analysis of logic, and logic is the most characteristic feature of Western thought.").

325. *See generally* DAISSETZ T. SUZUKI, ZEN AND JAPANESE CULTURE 413 (1970).

326. *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8 (1984).

327. *Id.*

328. *See id.*

decisions, sometimes not. But they knew how to do it.³²⁹

Unfortunately, Singer's approach still embraces a logical nature that moves us out of living now. Its logical nature reveals itself when Singer argues that when we make value choices, we think long and hard. We take time to imagine our lives with or without the decision, seek opinions, place value on these varying ideas, debate their merits, and then we decide.³³⁰ Even though he does not venture completely down a New Age path, Singer uses Critical Legal Studies' theoretical framework to move us away from our narrow view that law rests on logic, reason, and objectivity, and closer to Robert Gordon's notion that we live through a flowing process in which we act, imagine, rationalize, and justify.³³¹

In the end, I recommend reading these books, and I caution you not to believe that blacks, whites, and others walk through the social historical pages as either oppressors or oppressed, or either as the victimizers or the victimized. As Robert Ornstein would argue, we adopted a way of thinking (i.e., race consciousness), and we see the world through this schema. In so doing, we act as very powerful reality creators. And we do so within our self-selected roles. We all co-create those roles so that each of us can consciously participate in developing what Michael Talbot called social experiments. As such, we also can co-create personal worlds and manifold social realities, even if some of us doubt this *great* gift. On this point, Zen Master Kodo Sawaki wrote:

When we consider all the phenomena of all existences through the eyes of our illusions and errors, we may erroneously imagine that our original nature is contingent and mobile, whereas in reality it is autonomous and immobile. If we become intimate with our true mind and return to our original nature, then we understand that all phenomena, all existences, are inside our own minds, and that is *true of every being*.³³²

329. *Id.* at 62.

330. *See id.*

331. *See id.*

332. TEISEN DESHIMARU, THE ZEN WAY TO THE MARTIAL ARTS 20 (Nancy Amphoux trans., 1982) (emphasis added).

LECTURES

WHAT IS THIS THING CALLED THE RULE OF LAW?

JAMES W. TORKE*

*The rule of law bakes no bread, is unable to distribute loaves or fish (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised.*¹

INTRODUCTION

As Ronald Dworkin has reminded us, we are all “subjects of law’s empire, liegemen to its methods and ideals; law is our “sword, shield, and menace.”² Within this empire of law, it is our frequent boast that we live under the rule of law. The presidential election we just passed through—or rather just survived—was one of those frequent occasions for political figures to remind us of the rule of law. Whether it was William Daley or James Baker, Ted Olson or David Boies, it seemed as if each had the rule of law on his side. Looking back a couple of years to the Clinton impeachment, it was Henry Hyde or Ken Starr, Charles Ruff or David Kendall, reminding us of this thing called the rule of law, and how it, along with God, was on his side. Well, what is this thing called the rule of law?³

In one sense, these recalled forensic flourishes reveal more about political commonplaces than about law. Such references to the rule of law usually involve the invocation of a particular rule, statute or decision that points in the invoker’s favor, as in the rule of law demands that the ballots be recounted or not recounted, or that the President must be impeached and convicted or not, as the case may have been. Here, the rule of law is used to add a pretense of weight to legal or political argument.

Yet, in another sense, these invocations were quite appropriate, for we did see the rule of law, in its real sense, operate in both of these cases. As was observed by many at the time, when other nations call out the troops, we call in the lawyers. In other words, we resort to the rule of law, and it is a good thing

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1. MICHAEL JOSEPH OAKESHOTT, ON HISTORY AND OTHER ESSAYS 178 (1999).

2. RONALD DWORKIN, LAW’S EMPIRE, at vii (1986).

3. A search of Lexis-Nexis on February 18, 2001 for newspaper references during the last ninety days to “the rule of law” produced over 1000 documents.

that we do.

Probably the most famous reference to the rule of law is John Marshall's statement in *Marbury v. Madison*,⁴ that our government is "a government of laws, and not of men."⁵ Marshall's dictum was certainly not the first such boast. A comparable phrase appears in the world's oldest standing constitution, the 1780 Constitution of the State of Massachusetts.⁶ Nor is ours the only nation that makes such a boast. The Canadian Constitution Act of 1982 proclaims that, "Canada is founded upon principles that recognize the supremacy of God and the rule of law."⁷ Even the People's Republic of China has recently amended its constitution to express its adherence to the rule of law, though it does qualify its pledge as being to the socialist rule of law.⁸

I am a believer in the rule of law. I believe in its genuine existence and in its blessings. I believe that the rule of law is real, and that it is a coherent ideal. So, in some respects, what I have to say is a statement of faith—with some cautions appended.

Of course, this Article can only serve as something of an outline or agenda for further discussion. I am not sure that I have many original ideas, but I do want to state some old truths. The rule of law is a reality and a blessing, but it is beset by at least two problems: one, a kind of pathology; the other, something of a paradox. First, the reality; then the pathology and the paradox.

I. THE RULE OF LAW: ITS NATURE, VALUE, AND REALITY

There have been many efforts to describe the rule of law. Among the best known is Lon Fuller's list of the moral virtues inherent in any system calling itself a system of law.⁹ Fuller specifies eight essential elements of law: that law be general in its application; that it be public; that it operate prospectively; that it have reasonable clarity; that it be internally consistent; that it be practicable to comply with, that is, that there be a genuine congruence between the *ought* of law and the *can*; that it be relatively stable; and that there exist a congruency between the word of law and its enforcement.¹⁰ These are useful aspirations for any lawmaker and are certainly critical goals of the rule of law, especially as it is addressed to *lawmakers*. However, this is a very thin and abstract version of the rule of law. The rule *of* law is much more than rule *by* law.

The rule of law may be more fully understood by looking at some of the promises it makes, its premises and characteristics, its components, and finally how it operates.

4. 5 U. S. (1 Cranch) 137 (1803).

5. *Id.* at 163.

6. See MASS. CONST., pt. 1, art. XXX.

7. CAN. CONST., Act, 1982, pt. 1, pmbl. (Preamble to the Canadian Bill of Rights).

8. See CONST. OF THE PEOPLE'S REPUBLIC OF CHINA, art. 5 (1993).

9. See LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

10. See *id.* at 33-41.

A. Promises

First, the rule of law offers a palliative for the state's exercise of coercive power.¹¹ The rule of law offers the promise that only legal commands, that is, rules authoritatively promulgated, are obligatory, that government officials are subject to known, public laws and that there exists a fair, rational process through which one can protect one's interests. It offers protection against the caprice and cruelty of arbitrary will.¹² In place of arbitrary will, it requires reason—and reasons. Second, it promises individual freedom to pursue, within relatively clear limits, one's own ends rather than reducing its subjects to serve as means for the purposes of others.¹³ It thus promises prosperity or happiness.¹⁴ Legitimacy, constraint, autonomy, and ample room for the pursuit of happiness—these are its promises.

B. Characteristics and Premises

What are some of its characteristics and premises? The rule of law is mostly backward-looking, for it prefers the keeping of promises to the promotion of ends. As Lon Fuller wrote, it is "joined fore and aft with history."¹⁵ It is more narrative than logic. It is not scientific or philosophical, but it is not anti-science or anti-philosophy.¹⁶ It is neither a creation of nature nor a creature of God. It is modest in the sense that it goes only so far as it must and avoids, where possible, exposure of moral bedrock.¹⁷ It is founded in mistrust—in a recognition of the capacious bias, stupidity, and self-love of human beings; yet, it depends on the good faith of human beings. It is anti-utopian. It is a trade-off that prefers the good to the perfect.

C. Components

If we look at its components, we will see that the rule of law has to do with

11. See DWORKIN, *supra* note 2, at 93, 190.

12. For a useful discussion, see JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS* 1-28 (1986); JUDITH N. SHKLAR, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

13. See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 133-47 (1960).

14. See *id.* at 22-38; see also DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72-88 (1944); DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973); Douglass C. North, *The Historical Evolution of Politics*, 14 *INT'L REV. L. & ECON.* 381 (1994).

15. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 *HARV. L. REV.* 376, 380 (1946).

16. See generally *id.* at 391; Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029 (1990).

17. For a useful discussion of how the law relies upon "incompletely theorized agreements," see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35-61 (1996); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

much more than *rules* of law, or ordinary “law stuff.” The rule of law comprises formal constraints, institutional constraints, and informal constraints, so it operates at three levels. To imagine the rule of law, think of a pyramid, the top third of which consists of the ordinary “stuff” of law—constitutions, statutes, rules, regulations, doctrines, principles, decisions, and the like. In part, the rule of law is a law of rules and texts.¹⁸ These are law’s formal constraints. The middle third consists of institutions—constitutionalism, dispersal of power, judicial review by independent courts, open governmental processes, as well as a free press, decentralized law publishers, and widespread and varied access to legal education leading to an independent legal profession.¹⁹ These are law’s institutional constraints. The bottom and broadest third, upon which the pyramid rests, is the rule of law culture. The rule of law is our central cultural artifact, the ruling myth of our civic faith.²⁰ We are united as subjects of law’s empire, in liege to law. As de Tocqueville observed over a century ago, Americans turn unthinkingly to law, as if by instinct, to settle our disputes.²¹ We accept law as monarch and, in its proper sphere, as definitive. These are law’s informal constraints. The depth to which the rule of law is impressed upon our culture may be seen in the extent to which, somewhat as hypocrisy is vice’s tribute to virtue, so “lawlessness seeks to impersonate [i.e. to appear to be] the rule of law.”²² Justice Stephen Breyer, in a recent comment on the tragic case of the Cherokee Indians who in the 1830s were driven from their Georgia homelands despite a Supreme Court decision in their favor,²³ observed:

The outcome of this sad, premonitory tale [of the Cherokees] may . . . [seem to] provide support for those who believe that politics and force, not law, determine the facts of history. But I would draw a different lesson: a lesson about the insufficiency of a judicial decision alone to bring about the rule of law. This lesson helps us to understand John Marshall’s comment that “the people made the Constitution and the people can unmake it.” For our constitutional system does not consist only of legal writings. It consists of habits, customs, expectations, settled modes of behavior engaged in by lawyers, by judges, and by citizens, all developed gradually over time. It is that system, as actually practiced by

18. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

19. See, e.g., Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 130 (1993).

20. For a trenchant discussion of the rule of law as a central part of our ethos, see PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997).

21. See ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 283-290 (Vintage Books ed. 1945).

22. Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquicentennial Reflection*, 16 CONST. COMMENT. 51, 52 (1999).

23. *Worcester v. Georgia*, 31 U.S. 515 (1832).

millions of Americans, that protects our liberty.²⁴

Now how do these components—law stuff, institutions, and culture—work at ground level? How do they constitute the rule of law? What, for example, is the nature of a correct decision in law? What is a true statement of law?

D. Operation

There is much in law that is relatively clear, stable, and predictable where Fuller's eight virtues are realized to a high degree. There are rules which, as rules strive to do, pre-ordain a result. There are a lot of easy cases, that is, cases that come within the focal meaning of a rule. To some extent the clarity of law may be judged by the disputes that do not go to court,²⁵ of which there are surely millions.

But in its interesting and troublesome reaches, such as the recent presidential election, law does not seem very clear, let alone determinate. As has been said, "we are all realists now,"²⁶ at least in the sense that we have long been disabused of a strictly formalist view of law, a kind of legal fundamentalism. Indeed, we spend much of the first year of law school ridding students of a naive formalism that imagines law as a neat set of syllogisms, and of the belief that legal dispute resolution is causal, that is, that ready-to-hand legal materials *compel* a result somewhat as an answer in mathematics or formal logic is compelled. Yet once we abandon this formalistic view, is the rule of law, with its promise of relative stability and predictability, left as only platitude, nothing but patriotic sentimentousness? What saves us from a rampant subjectivity?

We should not underestimate the amount of law that is relatively clear. Law teachers especially, often working on the frontiers of law, tend to exaggerate the extent to which law is up for grabs. Nevertheless, much of the challenge of law—and the presidential election again comes to mind—involves uncertainties that people acting in good faith will see differently. What does the rule of law do for us in these settings in which it is most severely tested?

First, we approach legal disputes as if there *are* right answers²⁷ — we indulge a kind of quasi-formalist presumption -- and that the job of the advocates and decision-makers is to find them. We suppose that, in a sense, the solutions will be found in our past, for the rule of law mostly looks backwards or sideways, and only surreptitiously forward. We find, by seeking in our past, reasons that do not so much cause, as they do justify. These reasons provide normative, not causal force. They operate not as links in a chain²⁸ but more as the legs of a chair.

24. Stephen Breyer, "For Their Own Good": *The Cherokees, the Supreme Court, and the Early History of American Conscience*, NEW REPUBLIC, Aug. 7, 2000, at 32, 39.

25. See HAYEK, *supra* note 14, at 208.

26. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, *quoted in* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 165 (1999).

27. For a discussion of Dworkin's "one right answer" thesis, see, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 331-38 (1978); STEPHEN GUEST, RONALD DWORKIN 137-43 (1991).

28. See J. WISDOM, PHILOSOPHY AND PSYCHOANALYSIS, *in* LLOYD'S INTRODUCTION TO

However, these reasons (the legs of our chair) are not just *any* reasons.

The rule of law does not promise results so much as it promises an approach, a process, a practice of reason-giving, a set of argumentative conventions. The rule of law sets bounds to its discourse. Insofar as the rule of law is itself a rule, it is a rule of inclusion and exclusion of reasons, a rule of pedigree. The law provides a grammar and, just as the use of language or moves on a chessboard are correct or incorrect only insofar as they are within the grammar or the rules, so statements of law are correct only insofar as they observe the pedigree of law. In that sense at least, the law *is* an autonomous practice. And it is this that we try to teach our students—to think, see, and talk like lawyers; to operate sure-footedly within the understood conventions.²⁹ It is observance of this constraint which we expect from our judges: a good faith effort to resolve a dispute by drawing on *legal* reasons, and not other reasons, such as personal reasons or free-standing social, political, or moral purposes. As Justice Stevens so recently observed in his dissent in *Bush v. Gore*, “[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”³⁰ It is this boundedness that importantly distinguishes law from politics, science, and philosophy. The good faith judge’s morality is a *role* morality, dependent not so much on general virtue as upon faithfulness to the rule of law.

Now, of course, we are imperfect beings, and our knowledge and reason fall short. None of us is Dworkin’s Hercules.³¹ And so we often come to opposed conclusions—split decisions—one of which must control so that we can get on with life. The decision may be subject to revision. It certainly may be subject to criticism as unjust, unprincipled, or as masking improper reasons. New factors and considerations—instrumental concerns—may enter law from the outside, but they must be mediated and translated into the discourse of the law.

When we look back at the presidential election battle, it is a serious mistake to suppose that the rule of law broke down because the answers were not immediately apparent. The issues raised were new, and the answers had to be wrestled from the past, and debated. The indeterminacy we found arose from our eternal short-sightedness and from the inescapable tensions between principles, for that is the way principles operate—in opposition to each other, pulling us this way and that as we seek a kind of reflective equilibrium. The law may thus appear to have gaps, but it is equal to filling them. And it is a mighty good way to solve problems, especially when the alternatives are considered.

We witnessed good lawyering in and around the Florida cases. Certainly

JURISPRUDENCE 1353 (M.D.A. Freeman ed., 6th ed. 1994).

29. On the nature of the conventions within American constitutional law, see DENNIS PATTERSON, *LAW & TRUTH* 136-37 (1996) (contending that constitutional argument rests upon six “modalities”: history, text, structure, doctrine, ethics, and prudence). See also Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 10-24 (1997) (dividing constitutional interpretation into four “ideal” types: historicist, formalist, legal process, and substantive).

30. *Bush v. Gore*, 121 S. Ct. 525, 542 (2001) (Stevens, J., dissenting).

31. On the character of Hercules, see DWORKIN, *supra* note 27, at 105-23.

some serious flaws in our electoral system were revealed. At times, unruly demonstrations threatened the operation of law. Perhaps the Court ignored its passive virtues. In the end, many, including Justice Stevens, felt that “the Nation’s confidence in the judge as an impartial guardian of the rule of law”³² was shaken. But on the whole, we had a peaceful transition of power, thanks in large part to our legal traditions.³³

The rule of law, properly understood, is a glory of civilization and a real, wonderful, and complex thing. However, it is not the only thing, and sometimes we can have too much of a good thing.

II. TWO CAUTIONS ABOUT THE RULE OF LAW

A. *Law’s Pathology*

I noted earlier some cautions about the rule of law. The first of them may be considered a pathology of law. In his book, *The Ages of American Law*, Grant Gilmore wrote: “In Hell there will be nothing but law, and due process will be meticulously observed.”³⁴ This is one of my favorite legal quotes, for I think it points to a real danger in too much of a good thing. Do we have too much law? Well, it is hard to say, but we sure have a lot of it. In just the thirty-some years I have been professionally involved in law, at times it has seemed that the law has become smothering. At times, I feel law more as menace than as sword or shield; I feel claustrophobic amidst its ever-growing baggage and clutter—and I am supposed to be an expert, to know my way around. I would guess that many Americans, as they stand at the counter of a license branch, have felt the sort of dread—an utter helplessness—of which Kafka wrote. This condition of too much law has been called “jurismania”³⁵ or “hyperlexis,”³⁶ but however we name it, it seems to many that the law has become overweening—that “the river of law has

32. *Bush*, 121 S. Ct. at 542 (Stevens, J., dissenting.)

33. Much discussion of the “rule of law” may seem somewhat abstract, ethereal, gauzy, and difficult to verify, but the rule of law is a reality that gains some support from economic historians who, in answering the question of why some nations are better off than others, offer the answer of the emergence in late medieval times of the rule of law, especially in the commercial realm. Today, presumably hardheaded investors making foreign investment decisions consult the International Country Risk Guide, which measures and tries to quantify the extent to which a given nation lives by the rule of law. Indeed, studies have found a significant correlation between the rule of law and relative freedom and prosperity. See, e.g., Philip Keefer & Stephen Knack, *Why Don’t Poor Countries Catch Up: A Cross-National Test of an Institutional Explanation*, 35 ECON. INQUIRY 590-602 (1997).

34. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

35. PAUL F. CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* (1998).

36. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977). For further discussion of the proliferation of law, see LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985); PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994); PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNMENT* (2000).

swollen, spilling over its banks, and flooding surrounding areas,"³⁷ and we are drowning in it. I cannot describe all the phenomena, nor relate statistics, but I take it as a given that law has grown in density, complexity, and technicality.³⁸

There are many reasons why this has happened. I can only sketch a few. To some extent, such growth is inevitable as part of the natural tendency of social systems to grow in complexity. Such growth is fed by increases in population and advances in technology. As we have come to take a more instrumental view of law, we turn to it to solve almost every problem. Most law comes from the desire to do good.³⁹ As we come to see the interconnectedness of life, it is hard to find a stopping place. We are driven to order everything because everything matters. This tendency in turn breeds an increasing demand for security, the satisfaction of which feeds all too nicely the ambitions of those who seem to benefit from more law—politicians, bureaucrats, and, of course, lawyers. Some of the growth may even be in a sense aesthetic, as there is a certain beauty—to some lawyers at least—in getting it all accounted for, all contingencies anticipated. There is a kind of pleasure in closed-endedness and symmetry, such as attracts us to the well-devised, airtight rules of a game.

Thus the rule of law slides into the vice of legalism, a kind of *reductio ad absurdum* of the constitutional maxim that for every wrong there must be a remedy.⁴⁰ It all seems so fair, so enlightened, so sane. As an example of this tendency, consider the expansion of what constitutes criminal child abuse. Just a few months ago, I read of a prosecution of parents for the obesity of their child. More recently, I read of growing concern among child development experts about parents who impose diets upon their children. Next, I fear, will come more law, for here as everywhere, the public interest is at stake. I heard a story sparked by the Jon Benet Ramsay tragedy suggesting that entering children in beauty contests ought to constitute prosecutable child abuse.⁴¹ The law of parenthood continues to grow apace. Last spring when Bob Knight was called on the carpet, a California psychologist (who had never met Bob Knight) was quoted as saying,

37. SCHUCK, *supra* note 36, at 425.

38. A cursory glance at the shelves of a law library reveals the extent of increase. In 1926, six volumes of approximately 1000 pages per volume of the Federal Reporter were published. In 1997, twenty-seven volumes at 1600 pages per volume were issued. In 1947, Indiana Acts amounted to 1800 pages; in 1997, 4500 pages. The original Code of Federal Regulations (CFR) published in 1930 totaled 3450 pages. In 1999, the CFR occupied seven shelves.

39. But, as Justice Brandeis warned:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

40. See, e.g., IND. CONST. art. I, § 12.

41. Many new laws seem to spring from the efforts of parents whose children's tragic deaths have seemed to impel them towards law reform as the only path to expiation.

in effect, that there ought to be a law against boors, nastiness, and bullies.⁴² Wherever one stands on the Knight affair, it is hard to imagine advantage in a clutch of lawsuits by persons he has offended. Some may recall the old cartoon series, "There oughta be a law." Well, maybe we should reverse the presumption: there ought not to be a law. A couple of years ago, Daniel Patrick Moynihan lamented the scaling down of public morals, and he may have been right. Nevertheless, I wonder if a worse problem is the increase in crime stemming from too many criminal laws. Sometimes it is as much the legalizing of politics as the politicizing of law that we should fear.

Just within this University, growth in the number of hierarchies, processes, reviews, forms, and records makes one dizzy. Do I exaggerate? Perhaps a little; but the trend is clear. There is a cost in all this. Indeed, the rule of law itself is undermined when law spreads too far, for its promise includes that of substantial open spaces for personal choice. Moreover, too much law threatens to delegitimize law, for too much law breeds indeterminacy, inconsistency, randomness of application, the very vices that the rule of law abhors.⁴³ Too much law engenders suspicion, disrespect, and cynicism. A brave new world of total justice ought to be approached with caution.⁴⁴

Is there a cure? Perhaps not. Perhaps, like the plain language movement, any effort to simplify law is doomed to failure. There is, after all, an irreducible complexity in law.⁴⁵ We might, however, take more care to consider the costs of law, and the alternatives to law.

At a minimum, when the temptation to turn to law arises, we ought to undertake informal cost/benefit analyses, keeping in mind the law of unintended consequences. We ought to consider alternatives to law. Rather than top-down ordering, which is the way of law, we ought to consider the virtue of bottom-up controls, more or less informal substantive norms with no author and no identifiable date of origin.⁴⁶ As Robert Ellickson observed in his study of the informal norms governing cattle ranchers in the Shasta Valley of California: "[L]awmakers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order."⁴⁷

The state, after all, is only one source of social control. Alternative sources include intermediary associations, churches, private societies, and the like.

42. See John Strauss, *Secretary Says Knight Berated Her*, INDIANAPOLIS STAR, May 11, 2000, at A2.

43. In the 1999 session of the Indiana legislature, sixty-five bills to toughen the criminal law were introduced.

44. See FRIEDMAN, *supra* note 36, at 147-52 (reserving judgment on whether the benefits from pursuit of "total justice" outweigh the costs).

45. See R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715 (2000).

46. See ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 184 (1991).

47. *Id.* at 286.

Effective social bounds often depend most upon arational elements, common narratives, objects and symbols of affection, convictions and proverbs—things that the rule of law finds hard to comprehend. There are places law should not go. Law ought not enter certain areas where privacy, personality, politics, and power work well enough, and often better. As Aristotle observed, “[w]hen men are friends they have no need of justice.”⁴⁸ So too, we have seen the extent to which in some areas efficiency and general prosperity are best promoted by minimally-regulated markets. In short, idolatry of law threatens to destroy the rule of law. That is the pathology of law, but the rule of law also involves a paradox.

B. The Paradox: The Need for Good People

1. *The Paradox.*—The rule of law is real, but somewhat fragile. As we have seen, it is made up of and depends upon the existence of certain institutions and a culture of legality and compliance. The paradox here is that to fully understand the operation of the rule of law, we must, in a sense, turn Marshall’s dictum on its head: A government of laws cannot exist without good people. William Penn observed, “I know some say, let us have good laws, and no matter for the men that execute them: but let them consider, that though good laws do well, good men do better: for . . . good men will never want good laws, nor suffer ill ones.”⁴⁹ More to the present point, for the law to keep its promises, it must be in the hands of persons of good faith, or, as we noted earlier, good faith judges, executives, and legislators. One other group seems to be key to the maintenance of the rule of law, and that group is lawyers.

2. *The Central Role of Lawyers.*—In our look at the recent presidential election imbroglio, we took comfort in the fact that in times of crisis we usually call out the lawyers and not the troops. De Tocqueville said that lawyers were the American aristocracy.⁵⁰ Lawyers operate as the mediators between the stuff of law and the culture; they are the central institutional bearers of our rule of law myth. In a sense, lawyers are the quintessential Americans. Our nation was born in a controversy cast as a legal dispute. We are largely ruled by lawyers. Our judges are lawyers first. Lawyers are the trustees of the rule of law, and upon their virtue rests law’s legitimacy. They are the main operatives of the rule of law. When we talk of teaching students to talk, think, and act like lawyers, we are talking of developing their capacity to function faithfully within the conventions that inform the rule of law. What then are the implications for legal education?

3. *Implications for Legal Education.*—Most of our students will practice law. As a state institution, our principal charge is to train lawyers to operate

48. ARISTOTLE, NICHOMACHEAN ETHICS, Book VII, 1:1155a, in BIX, *supra* note 26, at 95.

49. WILLIAM PENN, CHARTER OF LIBERTIES AND FRAME OF GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA IN AMERICA, in COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 274 (Donald S. Lutz ed., 1998).

50. See DE TOCQUEVILLE, *supra* note 21, 283-90.

within the legal system. If law professors begin by disabusing students of the determinacy of law, how shall we end? What knowledge, faith, and professional habits must we instill?

It is a peculiarity of American law schools that their faculties are less and less engaged in the very activity for which they train students,⁵¹ for it is as true in law schools as it is in other university schools and departments that scholarship drives the academic community. And the currently favored form of scholarship mostly looks at law from the outside, often from a perspective supplied by other disciplines. More traditional legal scholarship—doctrinal studies, comprehensive treatises, or textbooks—is considered somewhat pedestrian, not very interesting, of a lower order. Thus, there has developed something of a dissonance between the research and the traditional teaching function, and inevitably, the scholarly impetus leaks into the classroom. At the same time, from the bench and bar there has been a pull somewhat in the opposite direction—for greater experiential modes of learning, such as law school clinics provide.

The result of these opposing forces is a widening divide between the research and teaching function and between law scholarship and law practice. As we are often reminded, less and less do judges or practicing lawyers read or cite law review articles.⁵²

I hesitate to be so dramatic as to say that we are seeing a battle for the soul of legal education, but it seems to me that law schools are not holding together very well. Indeed, the place of law schools within the university traditionally has been an uncomfortable one.⁵³ As anyone who has carried “across the street” the school’s recommendations for promotion and tenure well knows, our traditional ways are strange to most scholars. I was attracted to law teaching in part because it seemed to me to offer a career in teaching and scholarship where one had one foot in the university and the other connected somewhat to the workaday world of law practice. It is harder and harder for a single faculty member to maintain that kind of footing, to keep up with law in the academy and the law in action.

That said, I want to make it very clear that I am not denigrating the sort of scholarly work that has become predominant. Much of it is admirable and socially valuable for students, lawyers, lawmakers, and the general public alike; and many of its practitioners are fine teachers and good colleagues. But I do

51. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 265 (1993).

52. See, e.g., Philip F. Postlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL EDUC. 157, 173 (2000). We might liken what is happening in legal education to what happened to religious scholarship in the Nineteenth Century when the study of religion gradually shifted its focus from religious practice and the training of clergy to the study of the phenomena of religion from a scientific, critical, or historical perspective. Rather than teaching how to think and talk about God, the prevailing viewpoint was exteriorized to the critical study of texts and beliefs as social facts. See KAHN, *supra* note 20, at ix.

53. See Robert E. Rains, *Andrea's Adventures in Law Review Land*, 50 J. LEGAL EDUC. 306, 309 (2000).

think we ought to begin to reconsider how we train lawyers in this country. It is my understanding that most other legal systems train lawyers in a somewhat different way.

In England, for example, law is a department within the university. Undergraduate students major in legal studies. In these situations, the divide between scholarship and teaching is not so great because the purpose is not to train lawyers so much as to teach about the law. Students who wish to become lawyers emerge with a rich perspective about the nature of law, and then enter a period of what is essentially an apprenticeship or concentrated professional training where lawyers teach them how to be lawyers. To a great extent, American medical schools approach professional training in this way: typically the last two years and an extended postgraduate period involve practicing doctors training new doctors to practice. Perhaps we ought to reconfigure legal education in a somewhat similar way. I offer no well-honed models; what must be kept in mind is that we must provide not only education *about* the law but also training *within* the law. Both are conducive to teaching students to be lawyers, but professional training is most essential to the maintenance of the rule of law.

The rule of law is real, but it is subject to a pathology, and it involves a paradox. Its preservation depends upon recognition of its limits, and even more importantly, upon an appreciation of how it works, and the existence of practical skills to keep it working. To maintain the rule of law and to provide good-faith lawyers upon which the rule of law stands, we must both enlighten and train.

THE INTERNATIONAL HUMAN RIGHT TO HEALTH: WHAT DOES THIS MEAN FOR OUR NATION AND WORLD?

ELEANOR D. KINNEY*

INTRODUCTION

Throughout my career, I have searched for ways to compel access to needed health services of all types for all people in need. My search would be simple if there were a legal mandate in some source of law that required societies through their governments to assure adequate and affordable health care services. Unfortunately, at least in the United States, the right to health is not generally a legal right. Thus, whether one recognizes a right to health depends on one's political persuasion and moral values. In other words, a "right to health" is an option.

But international human rights law—which is now in the course of astonishing and rich development—may provide a legal mandate for a right to health in the United States and other nations. This is the subject of my paper: What does the international human right to health mean for the United States and the world?

What is the "right to health?" This preliminary issue is the subject of much debate. I will talk more about this issue later. But for now, a right to health could be understood on a continuum. At a minimum, it could mean a right to conditions that protect health in the population. It might also include civil and political rights with respect to access to population-based and personal health care services. At most, it could also include provision of medical care for the diagnosis and treatment of disease and injury for those unable to pay.

Defining the content of a right to health is a formidable challenge. But the challenge should not impede the recognition and development of a human right to health in international human rights law. For such definitional problems attend many human rights and particularly those affirmative economic, social and cultural human rights that are now coming into their own in the post-Cold War World.

The idea of an international human right to health is gaining attention and currency throughout the world today.¹ For example, in 1998, a Consortium of

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1. See, e.g., LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC (1997); HEALTH AND HUMAN RIGHTS: A READER (Jonathan M. Mann ed., 1999); BRIGIT C.A. TOEBES, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW (1999); Rosalia Rodriguez-Garcia & Mohammad N. Akhter, *Human Rights: The Foundation of Public Health Practice*, 90 AM. J. PUB. HEALTH 693 (2000); Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 INT'L J. HEALTH & HUM. RTS. 25 (1994); Brigit Toebes,

United States Human Rights Organizations sponsored programs to heighten awareness of human rights and health in honor of the fiftieth anniversary of the UN Universal Declaration of Human Rights.² Also, high visibility human rights cases such as the attempted extradition of General Agosto Pinochet of Chile and the work of non-governmental organizations (NGOs) such as Amnesty International and Human Rights Watch have heightened international awareness of human rights generally throughout the world.

However, U.S. health policy makers do not look to international human rights law for mandates or guidance when it comes to domestic health policy. In fact, it would probably surprise many U.S. health policy makers that a body of international law exists that has concrete implications for domestic policy making regarding health.

I would like to offer some ideas about how the international human right to health, established in a variety of sources of international human rights law and general international law, creates a right to health services in the nations of the world. Specifically, this body of law requires nation states to take affirmative steps to assure that residents of the country have access to population-based health protection measures and also affordable health care in the context of the nation's economic resources and cultural mores.

In this Article, I will lay out the sources of international law that establish a human right to health for all people. Second, I will suggest ideas for the implementation of a right to health throughout the world. Third, I will offer observations about the potential impact of full recognition of the international human right to health on the people of all nations, including the United States.

I. SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

Notions of human rights are not new. The idea that individual human beings have human rights has its origins in the world's religions that recognize two basic precepts: (1) God, however revealed, values all human beings, and (2) human beings, in turn, are accountable to God for their actions toward other human beings whomever they may be.

We generally attribute the origins of modern notions of human rights to the Eighteenth Century Enlightenment and the English Revolution of the Seventeenth Century. The legacy of the Eighteenth Century Enlightenment and the English, American and French Revolutions was recognition of civil and political human rights for all people primarily in relation to their governments. The Eighteenth Century Enlightenment did recognize one economic right, the right to property, which served as the basis of the emerging economic system of capitalism in the Industrial Revolution.

Toward an Improved Understanding of the International Human Right to Health, 21 HUM. RTS. Q. 661 (1999).

2. See George J. Annas, *Human Rights and Health—The Universal Declaration of Human Rights at 50*, 339 N. ENG. J. MED. 1777 (1998); Consortium for Health and Human Rights, *Health and Human Rights: A Call to Action on the 50th Anniversary of the Universal Declaration of Human Rights*, 280 JAMA 462 (1998).

Economic rights, in particular the human right to health, have different origins. They emerged primarily from the economic dislocations of the Industrial Revolution, which inspired many philosophers, including Karl Marx, to conclude that human beings also have rights to economic security. Notions of a positive right to health had its origins in the Sanitary Revolution of the Nineteenth Century when public health reformers, also troubled by the economic dislocations of the Industrial Revolution and empowered with scientific advances, such as the germ theory of disease, pressed for state-sponsored public health reforms.

World War II and the establishment of the United Nations (UN) are the watershed events in the evolution of the modern corpus of international human rights law and the current international human rights system. The UN embraced the recognition and protection of human rights as a core strategy for world peace. Since the UN Universal Declaration of Human Rights in 1948,³ a substantial body of international law has developed recognizing basic human rights and their promotion and protection. In brief, there are two major sources of international human rights law that are relevant to the right to health: (1) international treaties of the UN and regional international organizations such as the Organization of American States, and (2) customary international law.

A. International Treaties

The 1948 UN Universal Declaration of Human Rights is not a treaty but a statement of policy and a call to action much like the Declaration of Independence. It affirmatively states a human right to health: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care . . . and the right to security in the event of . . . sickness, disability"⁴

In the 1960s, the UN sponsored the development of two international covenants that articulate the human rights recognized in the UN Universal Declaration of Human Rights. These two covenants are the International Covenant on Civil and Political Rights (ICCPR)⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶

The International Covenant on Economic, Social and Cultural Rights (ICESCR)—the so-called Economic Covenant—is the most important in terms of the right to health. Article 12 of ICESCR states that the right to health includes "the enjoyment of the highest attainable standard of physical and mental health."⁷ The relevant provisions of this covenant are presented in Figure 1.

3. UN Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 13.1, U.N. GAOR, 3d Sess., at 71, 74, U.N. Doc. A/810 (1948).

4. *Id.*

5. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

6. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 22001 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, 993 U.N.T.S. 3 (1966).

7. *Id.*

Figure 1
The International Covenant on Economic, Social and Cultural Rights (ICESCR)
Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The UN Committee on Economic, Social and Cultural Rights has responsibility for the promotion, implementation and enforcement of this covenant. A human right to health is also recognized in numerous other international human rights authorities that establish prohibitions against government conduct that is detrimental to health. Such treaties include the International Convention on the Elimination of All Forms of Racial Discrimination of 1965,⁸ the Convention on the Elimination of All Forms of Discrimination against Women of 1979,⁹ and the Convention on the Rights of the Child of 1989.¹⁰

The UN also has established several international agencies to promote economic and social development world wide. The World Health Organization (WHO) has a legislative capacity to make international health regulations in addition to its health promotion functions. The WHO constitution states a right to the "highest attainable standard of health" and defines health broadly as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."¹¹

8. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 5(d)(vii), G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965), 660 U.N.T.S. 195, 222 (*entered into force* Jan. 4, 1969).

9. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 12, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (1980) (*entered into force* Sept. 3, 1981).

10. Convention on the Rights of the Child of 1989, Nov. 20, 1989, art. 24, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc A/44/49 (1989) (*entered into force* Jan. 4, 1990).

11. Constitution of the World Health Organization, *opened for signatures* July 22, 1946, 62

In addition, regional international organizations have treaties and implementation bodies. The Inter-American system for the protection of human rights of the Organization of American States (OAS) is based on the OAS American Declaration of the Rights and Duties of Man¹² and the OAS American Convention on Human Rights,¹³ among other instruments. Specifically, Article 11 of the American Declaration of the Rights and Duties of Man states “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”¹⁴ The more recent Protocol of San Salvador specifies a human right to health in its interpretation of the OAS Convention on Human Rights.¹⁵ These provisions are presented in Figure 2.

Figure 2
Protocol of San Salvador
Article 10

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.
2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:
 - a. Primary health care, that is, essential health care made available to all individuals and families in the community;
 - b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;
 - c. Universal immunization against the principal infectious diseases;
 - d. Prevention and treatment of endemic, occupational and other diseases;
 - e. Education of the population on the prevention and treatment of health problems, and
 - f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

Stat. 6279, 14 U.N.T.S. 185.

12. American Declaration of the Rights and Duties of Man, Mar. 30-May 2, 1948, O.A.S. res. XXX, adopted by the Ninth International Conference of American States, Bogota Columbia, OEA/Ser. L/V/II, 23 doc., 21 rev. 6 (1948), *reprinted in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17-24 (1988).

13. American Convention on Human Rights, *opened for signatures* Nov. 22, 1969, O.A.S. Official Records, OEA/Ser. K/XVI/II, doc. 65, rev. 1, corr. 2, 144 U.N.T.S. 123, 9 I.L.M. 673, 678 (1970), *reprinted in* ORGANIZATION OF AMERICAN STATES, *supra* note 13, at 25-54.

14. American Declaration of the Rights and Duties of Man, *supra* note 11, at art. 11.

15. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, O.A.S. T.S. 69 at art.10 (1988), *reprinted in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 500 (David J. Harris & Stephen Livingstone eds., 1998).

The Pan-American Health Organization (PAHO), located within WHO, promotes health in the Americas and implementation of these OAS instruments that recognize an international human right to health.

Also of interest, the 1993 Vienna Declaration and Programme of Action emphasizes the fundamental inter-relatedness of political and civil human rights and economic social and cultural human rights.¹⁶ The Vienna Declaration specifically provides:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁷

The Vienna Declaration has become a crucial principle in international human rights law recognizing the irreducible truth that all human rights must be recognized if specific human rights are to have concrete meaning. A look to the body of international treaties that comprise the corpus of human rights law at first glance seems promising. However, these treaties bind only those nations that ratify them. This situation is immediately disappointing with respect to the United States as the United States has not ratified many UN or OAS human rights treaties. Most importantly, the United States has signed but not ratified ICESCR and the two conventions on the rights of women and children. The Clinton Administration supported but did not achieve ratification. Also, when the United States has ratified a treaty, it has carefully limited its commitment through extensive reservations and generally assures that treaties are not self-executing under American law. At Figure 3 is a list of the major UN and AOS treaties establishing an international human right to health and the US commitment, or lack thereof, to these treaties.

16. 1993 Vienna Declaration and Programme of Action, U.N. GAOR, World Conference on Human Rights, 78th Sess., 22d plen. mtg., part 1, art. 5, U.N. Doc. A/CONF 157/23 (1993).

17. *Id.*

FIGURE 3 SIGNATURE AND RATIFICATION OF MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS BY THE UNITED STATES		
INSTRUMENT	SIGNATURE	RATIFICATION
UNITED NATIONS		
UN Declaration of Human Rights (Not a Treaty)	Yes	N/A
Constitution of the World Health Organization	Yes	Yes
International Covenant for Civil and Political Rights (ICCPR)	Yes	Yes 6/8/92
The International Covenant for Economic, Social and Cultural Rights (ICESCR)	Yes 10/5/77	No
International Convention on the Elimination of All Forms of Racial Discrimination of 1965	Yes	Yes 10/21/94
Convention on the Elimination of All Forms of Discrimination against Women of 1979	Yes 7/17/80	No
Convention on the Rights of the Child of 1989	Yes 2/16/95	No
ORGANIZATION OF AMERICAN STATES		
American Declaration of the Rights and Duties of Man (Not a Treaty)	Yes	N/A
American Convention on Human Rights ("Pact of San Jose, Costa Rica") (1969)	Yes 6/01/77	No
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") (art. 10) (1988)	No	No

Why is the United States’ commitment to international human rights treaties so mixed? One major reason is that international human rights treaties, unlike other types of international law, address internal matters of nations that fall within the realm of domestic policy. While the United States was actively involved in the development of international human rights instruments after

World War II, Senate ratification came slowly given concerns among Southern senators in the 1950s that ratification would incur international scrutiny of racial discrimination in the South. Also, the initial promise of the UN Declaration of Human Rights was subsumed by the Cold War politics that pitted Capitalism against Socialism.

The United States did not really embrace international human rights until the late 1970s when President Carter made human rights a cornerstone of American foreign policy. However, this period was brief. The Reagan-Bush administrations put other priorities over human rights promotion in their foreign policy. It is my hope that, with the end of the Cold War, the United States and other nations will take a new look at human rights generally and especially human rights of an economic nature such as the right to health.

B. Customary International Law

Customary international law holds promise as an important source of international law with respect to human rights. International customary law is interesting for it can legally bind nations regardless of treaty ratification. Section 102 of the Restatement (Third) of Foreign Relations Law of the United States contains a definition of international customary law.¹⁸ As Section 102 states: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."¹⁹ The two major elements of customary international law are state practice and *opinio juris*, a state's sense of legal obligation.

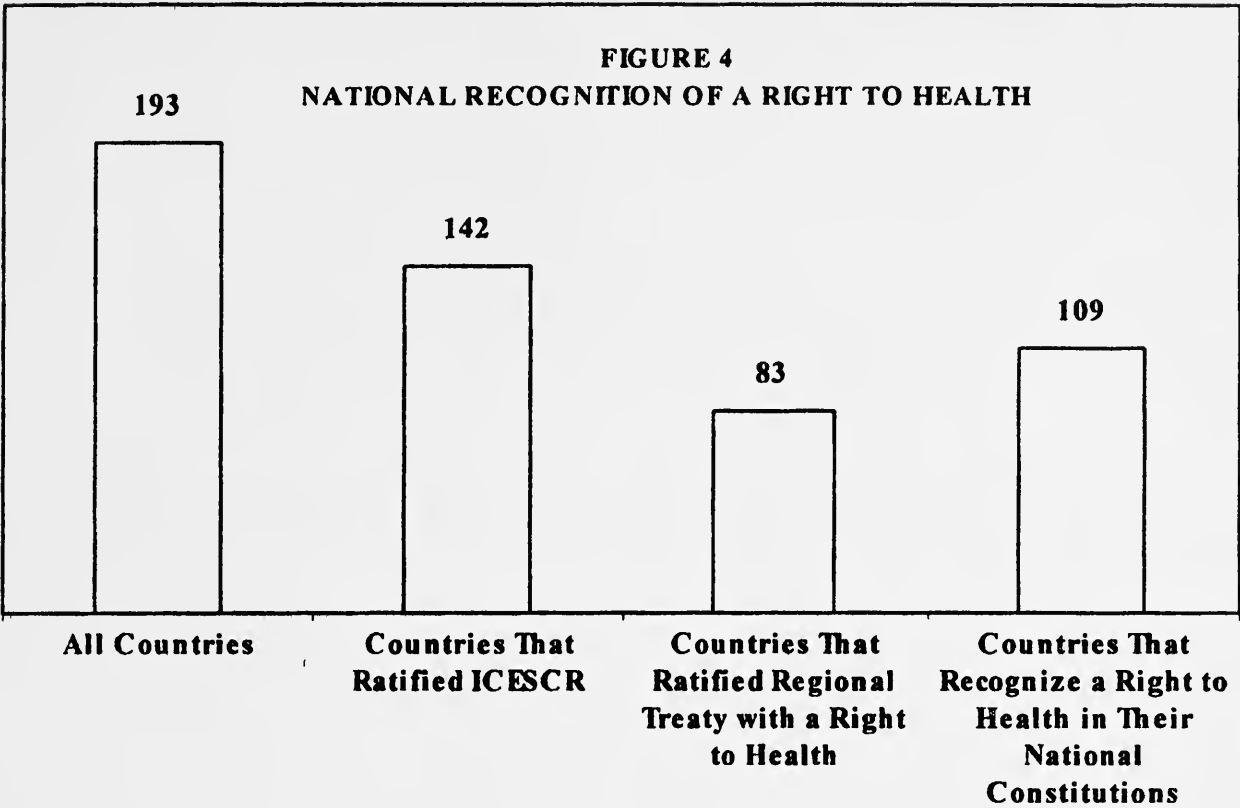
Customary international law also is promising when it comes to establishing a binding international human right to health in the nations of the world. Under the principles for the development of customary international law, widespread ratification of UN and regional treaties and other instruments recognizing international human rights can establish an international customary law of human rights. Specifically, treaties, declarations and other instruments become evidence of a general state practice in which states engage out of a sense of legal obligation. As evidence of general practice followed out of a sense of legal obligation, they establish the human rights obligations in the instruments as a customary international law. As international customary law, the obligations in the international human rights instruments then impose obligations on states, including the United States, that have not ratified the treaties. Thus, for example, the ICESCR is arguably customary international law due to its widespread acceptance internationally. As a consequence, it may be binding on all countries regardless of ratification.

Other law and practice in the United States and other nations provides evidence of custom regarding the international human right to health. Many nations, particularly Western democracies as well as many developing nations, establish an explicit right to health in their constitutions. Figure 4 presents the number of nations that have such provisions establishing a right to health in their

18. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

19. *Id.*

constitutions. Figure 4 also presents the number of nations that have signed UN or regional treaties and other instruments that recognize the human right to health.



With respect to the United States, the Federal Constitution permits Congress to provide for the general welfare.²⁰ However, the Federal Constitution, as interpreted by the Supreme Court, does not recognize a right to health care as a matter of constitutional law.²¹ For example, in *Maheer v. Roe*,²² the Court stated that “[t]he Constitution imposes no obligation on the states to pay . . . any of the medical expenses of indigents.”²³

Additionally, some constitutions of individual American states expressly recognize a right to health. For example, Alaska and Hawaii, the most recently admitted states, have provisions that either the legislature (Alaska) or the state (Hawaii) must provide for the promotion and protection of public health.²⁴ The Wyoming constitution contains a similar provision imposing the following duty on its legislature: “As the health and morality of the people are essential to their well-being, and to the peace and permanence of the state, it shall be the duty of

20. See U.S. CONST. art. 1, § 8, cl. 1.
21. BARRY R. FURROW, HEALTH LAW §10-1 (2d ed. 2000).
22. 432 U.S. 464 (1977).
23. *Id.* at 469.
24. See ALASKA CONST. art. VII, § 5; HAW. CONST. art. IX, § 1.

the legislature to protect and promote these vital interests . . .”²⁵ Similarly, South Carolina’s constitution designates health a matter of public concern: “The health . . . of the people of this State and the conservation of its natural resources are matters of public concern.”²⁶ Montana’s constitution is perhaps the most emphatic in providing a right to health as an affirmative matter in its section on inalienable rights:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and *seeking their safety, health and happiness in all lawful ways*. In enjoying these rights, all persons recognize corresponding responsibilities.²⁷

Furthermore, many nations have statutorily-mandated health coverage and public health programs for all or part of their populations. For example, both the federal and state governments of the United States have always promoted public health measures and have provided some health coverage for vulnerable groups. Specifically, states pursuant to their police powers and the federal government through the constitutional mandate to promote the general welfare have sponsored public programs and regulatory measures to protect and promote public health.²⁸ Also, the federal government provides health insurance to the elderly and disabled through the Medicare program.²⁹ Further, the federal government and all states are joint partners in the Medicaid program which serves poor children and their mothers as well as the poor elderly and disabled.³⁰ This considerable, if incomplete, commitment of governments to the provision of health care services pursuant to statute provides additional evidence of general state practice supporting the international human right to health as a matter of international customary law.

However, recognition of an international right to health as a matter of international customary law clearly has some problems. There is a circularity in the rationale for international customary law that is problematic. The Restatement Reporter’s comments lay out some of the problems with customary international law as now defined:

Each element in attempted definitions has raised difficulties. There have been philosophical debates about the very basis of the definition: how can practice build law? Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal

25. WYO. CONST. art. 7, § 20.

26. See S.C. CONST. art. XII, § 1.

27. MONT. CONST. art. II, § 3 (emphasis added).

28. See LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 25-59 (2000).

29. See 42 U.S.C. §§ 1395a-1395ggg (2000).

30. See *id.* at §§ 1396-1396v.

obligation before the law from which the legal obligation derives has matured?³¹

The reporter goes on to observe that “[s]uch conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined” and opines that “[p]erhaps the sense of legal obligation came originally from principles of natural law or common morality, often already reflected in principles of law common to national legal systems [and] practice built on that sense of obligation then matured into customary law.”³²

Customary international law—particularly as it pertains to economic rights such as the right to health—is also problematic from another perspective. What kind of remedies attend the human right to health recognized under customary international law? Can an American citizen sue in an international court to enforce this right? If so, can an international court rule that the United States or its component states has some kind of obligation to provide the individual involved access to needed health care services? If not, what is the extent of the customary human right to health beyond a moral duty?

II. IMPLEMENTING THE INTERNATIONAL RIGHT TO HEALTH

If there is a binding international human right to health, then how would it be defined and implemented? This is a challenge. In this effort, we should be imaginative. As lawyers, we tend to think of administrative regulation and enforcement as well as judicial recourse as the primary mechanisms for assuring the implementation of rights. However, these models may not be particularly appropriate or effective when we are talking about what, at least in the United States and many other nations, is essentially a right to health under international customary law.

Such legalistic visions of the right to health may also not be appropriate or effective as there is still some uncertainty about the content of the international human right to health. Indeed, getting a handle on the content of the right to health is a necessary first step to effective implementation. But this is no easy task. To have meaning, the content of the right to health must be essentially the same for all nations and people. Yet implementation is dependent on the resources, as well as cultures, of individual countries. How do we articulate the right to health in countries with vastly different economic resources and cultural traditions?

A. General Comment 14

The UN Committee on International Economic, Social and Cultural Rights—the treaty body responsible for implementing and monitoring ICESCR—has published a General Comment 14 to ICESCR that outlines the content to the international right to health.³³ This General Comment is extensive

31. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. 2 (1986).

32. *Id.*

33. United Nations, Committee on Economic, Social and Cultural Rights, U.N. ESCOR, 22d

and quite specific and intended to apply to nations that have ratified the ICESCR. It addresses the content of the right to health and the implementation and enforcement of the right to health. It also provides remedies for individual parties who have been denied the human right to health.

General Comment 14 begins with some observations about the normative content of the right to health. Specifically, General Comment 14 states that “[t]he right to health is not to be understood as a right to be *healthy*” and that “[t]he right to health contains both freedoms and entitlements.”³⁴ The General Comment 14 specifies the freedoms and entitlements as follows:

The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.³⁵

General Comment 14 then observes that the right to health extends

not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.³⁶

These provisions of General Comment 14 indeed prescribe a broad and inclusive conception of the content of the human right to health.

General Comment 14 also provides that the health care system of a states party must have certain institutional characteristics to realize the right to health. These include the availability, accessibility, acceptability and quality of needed health care services and facilities. “Availability” means that the states party has sufficient facilities and services for the population given the country’s state of development. Services include those that affect the underlying determinants of health, such as safe and potable drinking water. “Accessibility” to health care facilities and services include the four dimensions: non-discrimination, physical accessibility, economic accessibility (affordability), and information accessibility. “Acceptability” means that services and facilities must be respectful of medical ethics and culturally appropriate as well as being designed to respect confidentiality and improve the health status of those served. “Quality” means that services must also be scientifically and medically appropriate and of good quality.³⁷

Sess., *The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C, Dec. 4, 2000, ICESCR General Comment 14 (2000).

34. *Id.* (emphasis in original).

35. *Id.*

36. *Id.*

37. *See id.*

General Comment 14 imposes three types or levels of obligations: the obligations to *respect*, *protect* and *fulfill*. The obligation to *respect* requires states parties to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires states parties to take measures that prevent third parties from interfering with article 12 guarantees. The obligation to *fulfill* requires states parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.³⁸ General Comment 14 also reaffirms that several “core” obligations have been established in prior international human rights instruments: These core obligations, as well as additional obligations, are presented in Figure 5.

Figure 5

**GENERAL COMMENT 14
OBLIGATIONS REGARDING THE HUMAN RIGHT TO HEALTH**

**Core Obligations Established in
Prior International Human Rights Instruments:**

To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups:

To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;

To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;

To ensure equitable distribution of all health facilities, goods and services;

To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

Obligations of Comparable Priority:

To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;

To provide immunization against the major infectious diseases occurring in the community;

To take measures to prevent, treat and control epidemic and endemic diseases;

To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;

To provide appropriate training for health personnel, including education on health and human rights.

38. See *id.*

General Comment 14 clearly addresses implementation. It imposes a duty on each states party "to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health."³⁹ Implementation requires adoption of "a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks."⁴⁰ The national health strategy should also "identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources."⁴¹ The national health strategy and plan of action should "be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health."⁴²

General Comment 14 has extensive enforcement provisions and specifies violations of the right to health. The Comment explicitly provides that a states party which "is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under Article 12."⁴³ Further, if resource constraints make compliance impossible, the states party "has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above."⁴⁴

General Comment 14 also specifies violations. For example, violations of the obligation to respect include "state actions, policies or laws that contravene the standards set out in Article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality."⁴⁵ Violations of the obligation to protect include "failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties."⁴⁶ Finally, violations of the obligation to fulfil include "failure of States parties to take all necessary steps to ensure the realization of the right to health."⁴⁷

Finally, General Comment 14 accords remedies to individual parties. Specifically, any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.⁴⁸

General Comment 14 represents a significant step in delineating the international human right to state parties to the ICESCR. Yet, despite General Comment's specificity, as well as flexibility, the issue of how General Comment 14 will be interpreted, implemented and enforced in states parties at different stages of economic development and with markedly different cultures and values will still be a challenge. In sum, the content of the international right to health remains a tough issue. Thus, we ought to think carefully about how it is implemented and, more particularly, how it is enforced.

B. Realistic Implementation and Enforcement

When all is said and done, legal rights should be enforceable. Otherwise, we are back to where we began at the beginning of this paper. The human right to health is just a moral right after all. Realistically, implementation and enforcement of the international right to health is difficult particularly if predicated on customary international law. Implementation requires affirmative action on the part of government, and implicates intervention in the internal domestic affairs of nations. The United States and other nations would probably not tolerate excessive interference in their domestic affairs that are specified in General Comment 14 if they have not ratified ICSECR. Further, given the diverse cultures and economic levels of the nations of the world, it is hard to envision a mandate that would implement the right to health that would be appropriate to all nations.

But if the international right to health is to mean anything at all, it does seem appropriate to impose some implementation obligations on states and also require some type of regulation to assure implementation and enforcement. We must allow states considerable latitude to define strategies for implementation within their national economic, social and cultural circumstances. Universal coverage through prepaid managed care plans may make sense for the United States but is a ridiculous proposal for the Sudan. But if we allow such discretion, how do we not virtually vitiate the international right to health?

C. Proposed Approaches

Given economic, social and cultural differences among the nations of the world, I think that we should take three major approaches. First, define universal outcome measures that measure compliance with the core state obligations of the human right to health. Second, establish systematic reporting to responsible international bodies to monitor progress on implementation and compliance with international human rights obligations. Third, highlight civil rights violations, such as discrimination against protected groups, that inhibit access to health care services.

1. *Use of Outcome Measures.*—The first approach, defining universal

48. *See id.*

outcome measures for measuring the implementation of the human right to health is essential. Outcome measures would also indicate where countries need to concentrate efforts to meet their obligations under the international human right to health. They also assist in establishing concrete goals for human rights implementation.

The UN and the WHO already appreciate the possibilities of reported data on outcome measures in monitoring compliance of states with international human rights obligations. In its *Human Development Report 2000*,⁴⁹ the UN expressly recognizes a link between human rights and human development as well as the use of comparative data to measure compliance with international human rights obligations. Specifically, the UN acknowledges the potential use of such statistical indicators in human rights enforcement:

Statistical indicators are a powerful tool in the struggle for human rights. They make it possible for people and organizations—from grassroots activists and civil society to governments and the United Nations—to identify important actors and hold them accountable for their actions. This is why developing and using indicators for human rights has become a cutting-edge area of advocacy.⁵⁰

In this report, the United Nations has created four major indicators of economic development of use in measuring progress toward the achievement of economic human right. These are: (1) Human Development Index; (2) Gender Related Development Index; (3) Gender Empowerment Measure; and (4) Human Poverty Index. Further, in its *World Health Report 2000*, the WHO reports health system attainment and performance measures for member states. These measures are presented in Figure 6.

Figure 6

**World Health Report 2000
Health System Attainment and Performance Measures**

Health system attainment and performance in all Member States, ranked by eight measures

Basic indicators for all Member States

Deaths by cause, sex and mortality stratum in WHO Regions

Burden of disease in disability-adjusted life years (DALYs) by cause, sex and mortality stratum in WHO Regions

Health attainment, level and distribution in all Member States

Responsiveness of health systems, level and distribution in all Member States

Fairness of financial contribution to health systems in all Member States

49. UNITED NATIONS, HUMAN DEVELOPMENT REPORT 2000 (2000).

50. *Id.* at 89.

2. *Establish a Comparative Reporting System.*—If a country meets these universal outcome measures specified in a systematic reporting system, responsible international bodies, as well as domestic constituencies, will assume that implementation and compliance have occurred. This approach mitigates the need for international bodies to delve deeply into the internal affairs of nations to assure implementation and compliance. The importance of comparative reporting and publication of comparative statistics can do much to advance the implementation of the human right to health, particularly with respect to state obligations to take affirmative measure to promote public health or expand health coverage.

The WHO has begun reporting country health statistics on a comparative basis. Specifically, in *World Health Report 2000*, WHO published its first comparative analysis of the world's health systems. Using five performance indicators to measure health systems in 191 member states, WHO found that France provides the best overall health care followed among major countries by Italy, Spain, Oman, Austria and Japan.⁵¹

Indianapolis, Indiana, provides an nice exemplary case of the potential role and impact of reporting of health system performance outcome measures in correcting health system deficiencies and promoting health reform. In 1984, 1985 and 1987, Indianapolis had the highest black infant mortality rate of any city in the United States—higher than Detroit, Washington, DC, and New York. The Indianapolis infant mortality rate for blacks was about twenty-five in 1000. Countries with lower rates included United Arab Emirates, Soviet Union, Argentina, China, Trinidad, Sri Lanka, Jamaica, Cuba, Korea, and Singapore. The existence and publication of this statistic embarrassed civic and political leaders. Consequently, they adopted strategies on their own to address this problem with some success in a collaborative initiative called the Indianapolis Campaign for Healthy Babies.⁵² In sum, the comparative statistics on infant mortality spurred government and private organizations to mobilize and address this public health problem.

3. *Highlight Civil Rights Violations.*—Highlighting civil rights violations, such as discrimination against protected groups with respect to health care services, can do much to promote the international human right to health generally. For example, elimination of discrimination against women, minorities and other disadvantaged groups in the provision of appropriate health care services can do much to promote the right to health generally. This approach reinforces the admonition of the 1993 Vienna Declaration quoted above that all human rights are highly inter-related.⁵³

An example of the importance of recognizing the distinctions between the different types of rights that are subsumed in the larger right to health is the case of AIDS. According women equal status in marriage and divorce and recognizing fully their civil and political rights does much to empower women

51. Press Release, World Health Organization, *World Health Report 2000* (Feb. 21, 2001), available at http://www.who.int/whr/2000/en/press_release.htm.

52. See MARION COUNTY HEALTH DEP'T, *HEALTHY BABIES IN THE NEW MILLENNIUM* (1999).

53. See *supra* note 16 and accompanying text.

in rejecting unwanted sexual relations with HIV-infected partners.⁵⁴ Clearly, recognition and enforcement of civil rights for women would do much to prevent HIV infection and associated AIDS.

III. WHAT DOES THE HUMAN RIGHT TO HEALTH MEAN TO THE UNITED STATES AND THE WORLD?

Finally, what difference would it make to the nations of the world if there were a legal mandate for a human right to health? Such a legal mandate would play a tremendous role in making the promotion of public health and the expansion of health coverage a priority in all nations. Such recognition would encourage nations to promote health care programs as a priority. Such promotion in recent years has been exceedingly difficult due to the supervision of the economies of debtor nations by the International Monetary Fund with its neo-conservative economic policies for debtor nations.⁵⁵

Specifically, in the poor debtor nations of the world, recognition of a human right to health could shape lending policies of the International Monetary Fund and the World Bank in several ways. It could bolster efforts to protect infrastructure for the provision of health care services in a country by recognizing the importance of the right to health in the imposed economic development policies associated with international loans and economic assistance. Also, this right could end the disruptive practice of requiring user fees for the use of publicly funded clinics and other health care services—a widespread practice under neo-conservative policies of these lending bodies that has had a detrimental impact on health in poor debtor nations.

But what really does international human rights law have to contribute to a country as advanced and civilized as the United States? Don't we have the best health care system in the world? Compared to other nations and especially western democracies, the U.S. record with respect to access to health care and public health services is not strong. Indeed, the WHO ranked the performance of the U.S. health care system thirty-seventh among all nations due to disparities by race and income.⁵⁶

When compared to its peers, the United States compares quite unfavorably despite the fact it expends more per capita on health care than any other country. The United States ranked eighteenth in female life expectancy and twenty-second in male life expectancy.⁵⁷ The infant mortality rate in the United States was higher than all ODEC countries except Hungary, Korea, Mexico, Poland and Turkey.⁵⁸

54. See GOSTIN & LAZZARINI, *supra* note 1, at 46.

55. WALDEN BELLO ET AL., DARK VICTORY: THE UNITED STATES AND GLOBAL POVERTY (1999); MICHAEL CHOSSUDOVSKY, THE GLOBALIZATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS (2000).

56. See *supra* note 51.

57. See Gerard F. Anderson & Jean-Pierre Poullier, *Health Spending, Access, and Outcomes: Trends in Industrialized Countries*, HEALTH AFF., May-June 1999, at 178.

58. See *id.* at 190.

Additionally, the U.S. compares very unfavorably on health coverage. Over 42.5 million Americans (15.5%) have no health insurance coverage—a major increase since 1990s despite the strong performance of the American economy since the recession of the early 1990s.⁵⁹ Of these, 32.4% of the poor or 10.4 million people are without coverage.⁶⁰ The United States is one of four ODEC countries in which publically-sponsored coverage is not at least ninety-nine percent.⁶¹ With 33.3% public coverage, the United States stands behind Turkey, Mexico and the Netherlands.⁶² While clearly there may be differences in the quality of public coverage among ODEC countries, nearly every ODEC country has made a greater commitment to health coverage than the United States.

CONCLUSION

I have only outlined a few ideas about the international human right to health and what it could mean for our world and nation. I do think that the international human rights to health—as established under international customary law—arguably impose greater obligations on the United States and other nations with respect to health than we currently appreciate or recognize.

I would like to close with one question: Could it be that our obligations under international human rights law mean that we should spend some of our surplus on assuring health coverage for all Americans? If we took the average annual per capita expenditure for Medicaid eligible in 1995—a mere \$3700—we could cover the 10.4 million poor currently without coverage for about \$38.5 billion per year.⁶³ Would that make such a dent in the surplus?

59. See U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, HEALTH INSURANCE COVERAGE: 1999, at 2 (2000).

60. See *id.*

61. See Anderson & Poullier, *supra* note 57, at 181.

62. See *id.*

63. Katharine Levit et al., *Health Spending in 1998: Signals of Change*, 19 HEALTH AFF., Mar-Apr. 2000, at 124, 125.

NOTES

A CALL TO RESTORE LIMITATIONS ON UNBRIDLED CONGRESSIONAL DELEGATIONS: *AMERICAN TRUCKING ASS'NS V. EPA*

ALEX FORMAN*

INTRODUCTION

In May 1999, a three-judge panel handed down a decision in *American Trucking Ass'ns v. United States Environmental Protection Agency*¹ that revived the debate on whether the nondelegation doctrine should be restored as a limitation on congressional delegations to administrative agencies. The court used the nondelegation doctrine to determine that the EPA's interpretation of the Clean Air Act, which it used in setting the revised national ambient air quality standards, constituted an unconstitutional delegation of legislative power.² The court specifically ordered the EPA to develop an "intelligible principle" to guide the setting of its air quality standards in order to save the Clean Air Act from being found an unconstitutional delegation of legislative authority.³ The court reasoned,

it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"⁴

With these words, the court remanded the case to the EPA with directions to either set out a principle that would cabin its regulatory discretion or, if it could not construct an intelligible principle, petition Congress for legislation that would

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1. 175 F.3d 1027 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001).

2. *See id.* at 1038.

3. *Id.* at 1034 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

4. *Id.*

ratify the new air quality standards.⁵

The court's use of the nondelegation doctrine sent shock waves through the legal community leading many to question whether the court resurrected a once dead doctrine that could threaten the effective work of all modern day agency regulations. Scholars responded quickly and critically to the court's decision.⁶ Although few have stepped forward to defend the court's construction of a new delegation doctrine, a substantial amount of the scholarship has called for the original doctrine's revival⁷ or advocated its use as a tool to review agency interpretation of statutory authority.⁸ The Supreme Court ignored this call when it rejected the *American Trucking* version of the nondelegation doctrine with its decision in *Whitman v. American Trucking Ass'n*s.⁹

On February 27, 2001, the Supreme Court reversed *American Trucking*¹⁰ without analyzing whether the *American Trucking* nondelegation doctrine advanced the policies underlying the original doctrine and ignored the value of the doctrine as a check on agency discretion.¹¹

Instead, the Court chose to narrowly construe its past precedent in failing to adopt the *American Trucking* nondelegation doctrine. This Note advocates the

5. See *id.* at 1038, 1039-40.

6. See generally Craig N. Oren, *Run over by American Trucking Part I: Can EPA Revive Its Air Quality Standards?*, 29 ENVTL. L. REP. 10653 (1999) (arguing that the court's decision should be viewed as representing "rhetorical flourish" and should be justified through the arbitrary-and-capricious test where the courts are charged with taking a hard look at the agency's explanation for its actions); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 305 (1999) (describing the revival of the nondelegation doctrine as "a crude and unhelpful response to existing problems in modern regulation"); Recent Cases, *Administrative Law—Nondelegation Doctrine—D.C. Circuit Holds that EPA Construction of Clean Air Act Violates Nondelegation Doctrine*, 113 HARV. L. REV. 1051 (2000) (arguing that the court's approach undermines the underlying interests upon which the doctrine is based).

7. See generally JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132 (1980); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 65-67 (1982) (concluding that a restrictive approach to the rules that allows broad delegation has gained a "fresh dignity"); Thomas J. Byrne, *The Continuing Confusion over Chevron: Can the Nondelegation Doctrine Provide a (Partial) Solution?*, 30 SUFFOLK U. L. REV. 715 (1997) (explaining that for Congress to be truly accountable to the people and serve its representative function it must perform all essential legislative functions); John Evan Edwards, Casenote, *Democracy and Delegation of Legislative Authority: Bob Jones University v. United States*, 26 B.C. L. REV. 745 (1985) (allowing Congress to abdicate its public policy making duties through administrative delegations undermines the Constitution and the Founders' vision of democratic government).

8. Kenneth Culp Davis has authored many works promoting this ideal. See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

9. 121 S. Ct. 903 (2001).

10. *Id.* at 914.

11. See *id.*

position that the Supreme Court made a mistake in failing to adopt the new delegation doctrine laid out in *American Trucking* while rejecting any argument that the original delegation doctrine should be revised. To do so would threaten the mechanics of modern day government and substantiate the underlying fears of those who criticize the *American Trucking* panel's decision.

This Note advances the theory that the nondelegation doctrine has evolved into a legal tool for courts to use in reviewing agency regulatory actions to ensure that agencies are not straying from the policies laid out by Congress. Part I charts the evolution of the nondelegation doctrine from its inception in the early Nineteenth Century to its present day form. Part II analyzes the District of Columbia Circuit panel's decision in *American Trucking*. Part III asserts that the Supreme Court should have adopted the D.C. Circuit's reasoning in *American Trucking* because it allows the Court's to recognize the doctrine's underlying principles while recognizing Congress' need to delegate.

I. EVOLUTION OF THE NONDELEGATION DOCTRINE

A. History of the Nondelegation Doctrine

As a prerequisite to a full analysis and understanding of *American Trucking*, a discussion of the underlying precepts of the nondelegation doctrine and its status as a legal concept prior to the D.C. Circuit's 1999 decision is necessary. Such an analysis is best achieved by looking at the underlying principles of the doctrine and then charting the doctrine's evolution from its original purpose of defining legislative power to the current "intelligible principle" test. Throughout this evolution, the Supreme Court has only used the doctrine three times to strike down a statute as an unconstitutional delegation of power.¹²

The nondelegation doctrine is not specifically articulated in the U.S. Constitution, but courts have long recognized that its roots are located in Article I, Section 1, which grants legislative power exclusively to Congress.¹³ This power cannot be waived, even if Congress and the public desire to do so.¹⁴ The purposes of the nondelegation doctrine are to protect the integrity and boundaries set by the separation of powers principle¹⁵ and to monitor permissible delegations

12. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). One group of scholars has argued that because all three of these cases occurred within a year of each other, they were the result of "a temporary judicial hostility toward centralized national regulation, rather than concern over an allegedly unconstitutional transfer of legislative discretion." Aranson et al., *supra* note 7, at 10.

13. See David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1224 (1985).

14. See Sunstein, *supra* note 6, at 331. Article I, Section 1 states in relevant part, "[a]ll legislative Powers herein granted shall be vested in a Congress." U.S. CONST. art. I, § 1.

15. As the Supreme Court has made clear, the preservation of liberty will only be accomplished if the fundamental importance of the separation of governmental powers is

in order to ensure the grant of even limited power will not be abused.¹⁶ As observed by one commentator, "to the extent that the nondelegation doctrine is called upon to help enforce the structural commitment to separation of powers, its principal focus is the movement of power: is the authority of one branch being transferred to another, which will now possess a dangerous concentration of government power?"¹⁷ However, while early cases recognized the existence of the doctrine, the Supreme Court did not invalidate a challenged delegation for the first 138 years of the nation's history, nor has the Court rendered a decision in the last sixty-five years that has struck down a statute on nondelegation grounds.¹⁸

1. *The Original Form of the Nondelegation Doctrine.*—In its purest form the nondelegation doctrine prohibits Congress from delegating any of its lawmaking power to any other entity. Originally, the doctrine served as the primary restraint on the growth of federal regulatory authority, but as the government grew, many recognized that the doctrine required a measure of relaxation.¹⁹ The cases that consider the nondelegation doctrine "chronicle the Court's purposeful struggle to construct, if possible, a constitutional model for the administrative state that would enable Congress to use means it deemed necessary to pursue ends it deemed appropriate, without sacrificing ideas and forms central to the Constitution."²⁰

The foundation of the Court's nondelegation doctrine was laid out in Nineteenth Century cases challenging congressional delegations to the executive and judicial branches. In these early analyses, the Court took a formalistic approach, focusing on a strict enforcement of the separation of powers. *Wayman v. Southard*²¹ addressed a challenge against a provision of the Process Act of 1792 that allowed the Supreme Court to issue rules that regulated the service of process and execution of judgments in federal courts. The Court acknowledged

acknowledged by each branch of government. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (citing *Morrison v. Olson*, 487 U.S. 654, 685-96 (1988)).

16. See *Field v. Clark*, 143 U.S. 649, 692-93 (1892).

17. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 479 (1989).

18. See Sunstein, *supra* note 6, at 332.

19. See Edwards, *supra* note 7, at 752 (arguing that while the need for Congress to be able to delegate is apparent, so is the necessity of incorporating some limitations on the delegations to preserve the government envisioned by the Founders); Brian M. Jorgensen, *Delegations in Danger: The Texas Supreme Court Reinvigorates the Nondelegation Doctrine by Holding That the Official Cotton Growers' Boll Weevil Eradication Foundation Violated the Separation of Powers Clause in the Texas Constitution*: *Texas Boll Weevil Eradication Foundation, Inc. v. LeWellen*, 952 S.W.2d 454 (Tex. 1997), 29 TEX. TECH. L. REV. 213, 216 (1998) (concluding that Congress does not have the time, resources or expertise to create detailed statutes that control every regulatory agency) (citing 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 2.6, at 74 (3d ed. 1994)).

20. Farina, *supra* note 14, at 480.

21. 23 U.S. (10 Wheat.) 1 (1825).

that Congress could not delegate “powers which are strictly and exclusively legislative[,]” but Justice Marshall, writing for the majority, held that the Act did not involve such a delegation.²² Justice Marshall refused to define the precise boundary of what constituted a delegable versus a nondelegable legislative power, but he nonetheless concluded that the Act was constitutional because it merely delegated “a power to vary *minor* regulations, which are within the great outlines marked by the legislature.”²³

The legislative/nonlegislative distinction set out by Marshall in *Wayman* was again addressed in *Field v. Clark*,²⁴ where Congress delegated to the President the responsibility of determining whether the country of origin of entering goods imposed reciprocally unequal and unreasonable tariffs on American goods.²⁵ If the President made such a determination, then a tariff would take effect against the country importing the goods.²⁶ Unlike *Wayman*, the Court in *Field* was more willing to discuss the meaning of “legislative power.” In the Court’s view, Congress was allowed to delegate the implementation of a previous policy decision.²⁷ The Court held that as long as the delegatee was merely an “agent of the law-making department” and the duties of the delegatee did not include “the expediency or the just operation” of the statute, the delegation would satisfy the standard of the delegation doctrine.²⁸

2. *The Intelligible Principle Standard*.—In the early Twentieth Century, the Court began to stray from the strict legislative/nonlegislative distinction that was articulated in *Field*. For example, in *United States v. Grimaud*,²⁹ ranchers indicted for grazing sheep on federal land without a permit challenged a statute that delegated broad regulatory authority to the Secretary of Agriculture to protect public forests from fire destruction and other depredations.³⁰ The underlying problem addressed in *Grimaud* was that the enabling statute did not set forth a defined set of conditions upon which the Secretary could base his decisions, and thus, the statute did not meet the legislative/nonlegislative standard set out by *Field*. However, the Court still upheld the statute because of the *Wayman* court’s statement that, “when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions ‘power to fill up the details’ by the establishment of administrative rules and regulations.”³¹ The broad statutory discretion sanctioned in *Grimaud* made it increasingly difficult to distinguish legislative activity from nonlegislative activity. The Court began to look not only at the nature of the delegated power,

22. *Id.* at 42.

23. *Id.* at 45 (emphasis added).

24. 143 U.S. 649 (1892).

25. *See id.* at 680-82.

26. *See id.* at 693.

27. *See id.* at 693-94.

28. *Id.* at 693.

29. 220 U.S. 506 (1911).

30. *See id.* at 509.

31. *Id.* at 517 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

but the extent of the power delegated.³²

The Court substantially advanced the "fill up the details" analysis in 1928, in *J.W. Hampton, Jr., & Co. v. United States*,³³ where it announced a new standard for assessing delegability. "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."³⁴ This standard led to the first successful nondelegation challenges and the total abandonment of the legislative/nonlegislative distinction.

3. *Successful Delegation Challenges.*—*Hampton* provided the basis for the Court to sustain broad congressional delegations of legislative power to agencies, thus making it difficult for early Twentieth Century legal observers to see any viability left in the doctrine.³⁵ President Roosevelt's New Deal and its sweeping delegations to private and public entities changed the legal playing field. The Supreme Court, which had not found a delegation to be unconstitutional in 168 years,³⁶ found three New Deal delegations to be in violation of the nondelegation doctrine in a little over a year.

In *Panama Refining Co. v. Ryan*,³⁷ the Court examined section 9(c) of the National Industrial Recovery Act (NIRA), which authorized the President to prohibit any interstate shipment of petroleum products that violated state law. The Court developed a test to determine whether the provision had the specificity necessary to constitute a constitutional delegation of power to the President.³⁸ In analyzing the statute, Chief Justice Hughes determined that section 9(c) was in fact an unconstitutional delegation because it did not provide the appropriate guidelines or policy statements within its text.³⁹ In short, the Court determined that the statute was not a valid delegation because it did not provide an intelligible principle or legislative criteria that would cabin the President's discretion in implementing the provision of the statute.⁴⁰

Three months later the Court was presented with a similar issue in *A.L.A. Schechter Poultry Corp. v. United States*.⁴¹ The statute at issue was NIRA provision 3, which gave the President the power to "approve codes of fair

32. See Farina, *supra* note 14, at 483.

33. 276 U.S. 394 (1928) (upholding a statute that gave the President the power, after an investigation by the Tariff Commission, to increase the congressionally established tariff schedule, if necessary, to level the costs of production between the U.S. and a competing country).

34. *Id.* at 409.

35. See Jorgensen, *supra* note 16, at 231.

36. See Sunstein, *supra* note 6, at 332.

37. 293 U.S. 388 (1935).

38. The three prongs of the test were: (1) whether the statute's text articulated a policy regarding the statute's text; and (2) whether Congress set forth a standard that called for presidential action; and (3) whether the President was required by Congress to first make a finding before exercising the authority under the statute. See *id.* at 415.

39. See *id.*

40. See *id.* at 431-33.

41. 295 U.S. 495 (1935).

competition” for the poultry industry.⁴² In holding the provision to be an unconstitutional delegation of legislative power, the Court rejected the government’s argument that analogized provision 3 to a trio of recent cases that upheld delegations to the ICC, the FCC, and FTC.⁴³ Chief Justice Hughes, again writing for the majority, distinguished the three cases from the present controversy by noting, in part, that in these prior decisions Congress had created an expert administrative entity that was guided by “statutory restrictions adapted to the particular activity.”⁴⁴ The Court concluded that no such claim could be made for the NIRA because it gave the President “unfettered discretion” in making laws that he felt were necessary to expand or rehabilitate the industry.⁴⁵

In his concurring opinion, Justice Cardozo, referred to the *Panama Refining* decision and concluded that Congress had gone too far in its delegation of legislative power to the President.⁴⁶ Cardozo reasoned that the delegated power was “unconfined and vagrant”⁴⁷ and clearly represented an attempt to create a delegation that was “not confined to any single act nor to any class or group of acts identified or described by reference to a standard.”⁴⁸ The combined language of Chief Justice Hughes and Justice Cardozo seemed to indicate that the Court was monitoring congressional delegations with a closer eye in order to maintain the separation of powers in the federal government.

In *Carter v. Carter Coal Co.*,⁴⁹ the Court examined the Bituminous Coal Conservation Act of 1935 (BCCA), which gave a board of coal producers and miners authority to set minimum prices for the represented districts, as well as wage rates and maximum labor hours for the entire industry.⁵⁰ The Court concluded that this delegation was unconstitutional because it was “legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”⁵¹ The Court made it clear that congressional delegations to private entities would not be tolerated.

42. *Id.* at 521-22 (quoting 15 U.S.C. § 703(c) (1933)).

43. *See* *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933) (holding that the Federal Radio Commission was delegated responsibility to assign radio frequencies under public interest standard); *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934) (holding that the Federal Trade Commission was delegated power to eliminate unfair methods of competition); *N.Y. Cent. Sec. Co. v. United States*, 287 U.S. 12 (1932) (finding that the Interstate Commerce Commission was delegated the authority to regulate ownership of railroad systems in a manner that served the public interest).

44. *A.L.A. Schechter Poultry*, 295 U.S. at 540.

45. *Id.* at 537.

46. *See id.* at 551 (Cardozo, J., concurring).

47. *Id.*

48. *Id.*

49. 298 U.S. 238 (1936).

50. *See id.*

51. *Id.* at 311.

This rapid succession of cases marks the first and only occurrence when the Supreme Court has invoked the nondelegation doctrine to invalidate congressional delegations of power,⁵² raising some important questions. Primarily, why did the Court invoke the nondelegation doctrine in these particular situations? Moreover, what was it about the years of 1935 and 1936 that distinguish them from the almost two hundred years of jurisprudence that expressed the view that the nondelegation doctrine was a "nondocctrine"?⁵³ The only rational explanation to these questions is that the Court was concerned about the concentration of power in the central government resulting from Roosevelt's New Deal legislation, and, since the substantive due process rule had been terminated, the Court was looking for another means to control potentially excessive government authority.⁵⁴ This rationale is supported by the Court's quick return to the view that such broad delegations did not violate the separation of powers principle, so long as Congress articulated an intelligible principle supporting the delegation. As one commentator stated:

The "intelligible principle" construct no longer permitted even a fiction that division of power was being preserved . . . [T]he edifice of government now appeared as an ordered collection of weight-bearing and subsidiary components: agency decisions were acknowledged to be "indeed binding rules of conduct," but were accepted as "subordinate rules" that existed "within the framework of the policy which the legislature has sufficiently defined." The emphasis was shifting from power divided to power kept in check.⁵⁵

Therefore, the Court became less concerned with preserving the separation of powers principle and became more concerned with preventing the formation of a tyrannical government by external control over its power.

4. *Post New Deal Delegation Decisions.*—The underlying sentiments of the intelligible principle constraint were manifestly evident in *Yakus v. United States*,⁵⁶ where the Emergency Price Control Act of 1942 was challenged for its grant of authority to the Office of Price Administration.⁵⁷ The Act gave authority to the Administration to establish maximum prices for commodities in order to prevent inflation.⁵⁸ The Court reasoned that "[o]nly if [it] could say that there is

52. See Aranson et al., *supra* note 7, at 10.

53. *Id.* at 12.

54. See *id.* at 16. Aranson argues that the Court's experimentation with the nondelegation doctrine as a substitute for substantive due process was limited because other legal doctrines, such as procedural due process, equal protection, and the First Amendment, were better suited to limiting excessive grants of power because they only voided the uncontained authority, while the nondelegation doctrine voided the entire statute. See *id.* at 16-17.

55. Farina, *supra* note 14, at 485 (quoting *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 428-29 (1935)).

56. 321 U.S. 414 (1944).

57. See *id.* at 418.

58. See *id.* at 419-20.

an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed," would it be justified in overriding the means that the Administrator chose to prevent inflation.⁵⁹ The Court went on to hold that the Emergency Price Control Act was a constitutional delegation because it was able to ascertain standards from the Act that allowed for external review of the Administrator's decisions.⁶⁰

The approval of the Emergency Price Control Act marks the return of the nondelegation doctrine as a dead-letter principle;⁶¹ however, some have argued that the decision represents an exception falling under Congress's war power because it involved a delegation to a public official during a wartime emergency.⁶² However, as evidenced by cases following *Yakus*, the Court did not view the case as a wartime exception, but rather as the expression of the general policy that broad delegations of powers will be upheld.⁶³ The Court shifted its focus from ensuring that Congress established the policy framework for regulatory decisions, to questioning whether external power to control the delegatee's decision could be exerted under the delegation at issue. "After *Yakus*, the constitutionally relevant inquiry is no longer whether Congress resolved certain types of issues, but whether it supplied enough policy structure that someone can police what its delegatee is doing"⁶⁴ The Court's experimentation during the New Deal era with the nondelegation doctrine as a limit on regulatory authority was short lived, and the Court quickly reverted back to the days of only paying lip service to the doctrine as it upheld broad delegations.

While the Court has not invoked the doctrine in the last sixty-four years, it has not repudiated the doctrine either.⁶⁵ In many of its decisions, the Court has still used the doctrine as a theoretical check on Congress's delegations of authority.⁶⁶ Rather than examine whether the delegation was in fact permissible, the Court has instead used the principles of the doctrine to narrowly construe broad statutes in order to find them constitutional.

In *Kent v. Dulles*,⁶⁷ the Court reviewed the Secretary of State's promulgated regulations that prohibited the issuance of a passport to any current or recent past member of the Communist party.⁶⁸ Two applicants were denied passports for their refusal to sign an affidavit asserting they were currently or had previously

59. *Id.* at 426.

60. *See id.*

61. *See Aranson et al., supra* note 7, at 12.

62. *See id.*

63. *See id.*

64. Farina, *supra* note 14, at 486.

65. *See Sunstein, supra* note 6, at 332.

66. *See Edwards, supra* note 7, at 755.

67. 357 U.S. 116 (1958).

68. *See id.*

been members of the Communist Party.⁶⁹ Both applicants brought suit challenging the Secretary's decision. Justice Douglas, writing for the majority, narrowly construed the statute⁷⁰ as only allowing denial of passports based on citizenship or illegal activities.⁷¹ Justice Douglas justified this reading by saying that a broader reading of the statute might render the statute an unconstitutional delegation.⁷² Acknowledging that the right to travel is a fundamental liberty of all citizens, the Court determined that the Secretary's regulations were invalid because only Congress can rightfully limit such a liberty.⁷³ The Court therefore effectively dodged the delegation issue by choosing a construction of the statute that would not violate the principles of the doctrine.

From *Kent*, commentators have concluded that when a congressional delegation interferes with a fundamental right, such as the right to travel, the Court will assume that Congress did not intend to delegate the interfering power without a showing of "a clear statement of congressional intent."⁷⁴ In *National Cable Television Ass'n v. United States*,⁷⁵ the Court again narrowly construed a statute in order to avoid the nondelegation issue; however, in this case the delegation did not involve a fundamental right.

National Cable brought into question a statute that mandated federal agencies charge private individuals and corporations for the cost of services provided.⁷⁶ A corporation challenged the Federal Communication Commission's (FCC) fee assessment that covered all the costs of regulating the corporation. Justice Douglas again authored the majority opinion, in which he interpreted the statute as allowing the charging of fees only to cover the benefits conferred and not the ability to charge an amount that recouped all of the costs of regulation.⁷⁷ The Court determined that such a fee would constitute a tax.⁷⁸ Since the Court determined that only Congress has the ability to tax, it found that Congress could not have intended to delegate the taxing power, even though one could reasonably read the statute as such.⁷⁹

Although the Court did not invoke the delegation doctrine in either *National Cable* or *Kent*, the Court did reveal that congressional competence "to exercise certain powers will play a role in determining how explicit a delegation must

69. *See id.* at 118-20.

70. *See id.* at 129.

71. *See id.* at 128.

72. *See id.* at 130.

73. *See id.* at 129.

74. Aranson et al., *supra* note 7, at 12 (citing STEPHEN BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 263 (1979)).

75. 415 U.S. 336 (1974).

76. *See id.* at 337. Fees were to be based on the "value to the recipient, public policy or interest served, and other pertinent facts." *Id.* (quoting The Independent Officers Appropriation Act, 31 U.S.C. § 483 (1952)).

77. *See id.* at 342-43.

78. *See id.* at 340-41.

79. *See id.*

be.”⁸⁰ These cases also reveal that the Court is able to avoid the permissible delegation issue by narrowly construing a statute to limit the delegated authority so the statute will not violate the nondelegation doctrine. While congressional competence and standards will often limit overbroad delegations, it is evident from these cases that the Court will go out of its way to avoid striking down a statute as an unconstitutional delegation.⁸¹ Recent cases, however, seemed to signal a renewed interest in the use of the nondelegation doctrine as a means to monitor agency discretion.⁸² It is this new line of cases that served as the foundation for *American Trucking*.

B. The Roots of American Trucking

Following *Schechter* and *Panama Refining*, the nondelegation doctrine returned to its days of dormancy,⁸³ and the Court gave Congress a substantial amount of deference in delegating authority to administrative agencies.⁸⁴ However, since the issuance of *National Cable* and *Kent*, there have been concurring, dissenting, and majority opinions calling for a retreat from the court’s highly deferential position.⁸⁵

In *Amalgamated Meat Cutters v. Connally*,⁸⁶ a three-judge panel was presented with a challenge to the Economic Stabilization Act of 1970. The Act gave the President the power “to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries.”⁸⁷ The President then delegated these powers to the Cost of Living Council.⁸⁸ In upholding the delegation, the court looked to procedural controls that would place limits on the

80. Edwards, *supra* note 7, at 758.

81. See *id.* at 755-58.

82. See, e.g., *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *Int’l Union, United Autos. Aerospace & Agric. Workers of Am. v. OSHA*, 37 F.3d 665 (D.C. Cir. 1994).

83. “The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930’s, has been virtually abandoned by the Court for all practical purposes.” *Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring). “A leading commentator flatly advised attorneys in 1958 that delegation claims were so farfetched that making them would discredit one’s other claims.” Schoenbrod, *supra* note 10, at 1233.

84. See Jessica Roff, Note, *South Dakota v. United States Department of Interior: Another Broken Promise to the United States Indians*, 49 ADMIN. L. REV. 453, 459 (1997) (arguing that Supreme Court decisions recognize legislative need to adapt to “complex conditions with which Congress cannot deal directly”).

85. See, e.g., *Indus. Union Dep’t*, 448 U.S. at 671.

86. 337 F. Supp. 737 (D.C. Cir. 1971) (widely recognized as an authoritative statement of modern day approach to delegation doctrine). See, e.g., Aranson et al., *supra* note 7, at 14; Schoenbrod, *supra* note 10, at 1241.

87. *Amalgamated Meat Cutters*, 337 F. Supp. at 764.

88. See *id.* at 743.

power delegated to the Council.⁸⁹ The court reasoned that the Administrative Procedure Act's requirements for judicial review and notice-and-comment rulemaking applied to the Council and thus provided adequate limits on the delegated power.⁹⁰ The opinion asserts that, in order to resolve a delegation doctrine issue, a court must look to the procedural and substantive controls within a statute to determine if they create adequate limitations on the agency's power.⁹¹

The Supreme Court returned to the delegation issue in 1980, in *Industrial Union Department v. American Petroleum Institute*⁹² where the Court was presented with a challenge to the Occupational Safety and Health Administration's (OSHA) promulgation of standards that lowered the level of permissible benzene exposure levels.⁹³ OSHA cited its enabling statute⁹⁴ as the authority for lowering the permissible level of exposure. In the plurality opinion, written by Justice Stevens, four Justices returned to the use of the nondelegation doctrine as a tool of statutory construction.⁹⁵ The plurality reasoned that the agency's interpretation of the act would constitute an unconstitutional delegation because the agency would have unbridled discretion in regulating the private sector.⁹⁶ The Court concluded that Congress could not have intended such a broad delegation,⁹⁷ and thus, the statute must be read as requiring OSHA to show significant risk before setting the permissible benzene standards.⁹⁸

Justice Rehnquist concurred in the judgment,⁹⁹ but argued that a portion of the Act should be struck down because it constituted an unconstitutional delegation of power.¹⁰⁰ In his famous concurrence, Justice Rehnquist argued that Congress had not properly identified a means of limiting the agency's discretion.¹⁰¹ Since Congress had not made the policy choice of when OSHA should and should not regulate, Rehnquist concluded that the Act violated the nondelegation doctrine and must be struck down.¹⁰²

Justice Rehnquist made the same argument in his dissent in *American Textile Manufacturers Institute, Inc. v. Donovan*.¹⁰³ This time, joined by then Chief Justice Burger, Justice Rehnquist again called for OSHA's enabling act to be

89. *See id.* at 759-60.

90. *See id.* at 760-62.

91. *See* Aranson et al., *supra* note 7, at 14; Sunstein, *supra* note 6, at 342-44.

92. 448 U.S. 607 (1980).

93. *See id.* at 613.

94. 29 U.S.C. § 655(b) (1999).

95. *See Indus. Union Dep't*, 448 U.S. at 646.

96. *See id.* at 651-53.

97. *See id.* at 646.

98. *See id.* at 651.

99. *See id.* at 671 (Rehnquist, J., concurring).

100. *See id.* at 687-88.

101. *See id.* at 672.

102. *See id.* at 687-88.

103. 452 U.S. 490, 547 (1981).

struck down as an unconstitutional delegation of power.¹⁰⁴ At issue was whether the Act required OSHA to undergo a cost benefit analysis in setting the permissible exposure levels of cotton dust for workers.¹⁰⁵ The majority concluded that the Act did not impose such a requirement.¹⁰⁶ Rehnquist, however, reasoned that if the Act did not require such an analysis, the regulatory power delegated to OSHA would be an unconstitutional delegation of legislative responsibilities to the Executive Branch, and thus, must be struck down as a violation of the nondelegation doctrine.¹⁰⁷ These cases indicate that at least a portion of the Court was retreating from its willingness to uphold all delegations.

In 1983, the Court struck down the legislative veto provision of immigration law in *INS v. Chadha*.¹⁰⁸ The Court concluded the veto provision was an invalid delegation of legislative authority because it allowed legislative action without going through all the proper channels of the legislative process.¹⁰⁹ The dissent viewed the majority's rationale as contrary to the Court's precedent of upholding law made outside of the legislative process.¹¹⁰ In justifying its decision, the majority attempted to distinguish legislative delegations to the Executive Branch from a delegation of full legislative power to one or both of the Houses.¹¹¹ The Court reasoned that executive agencies were subject to judicial review which ensured compliance with the statute.¹¹² The Court concluded that there was not a similar check on Congress and thus, the delegation was invalid.¹¹³ The distinctions offered by the Court in *Chadha* have been criticized and have led to the conclusion that *Chadha* stands for "a transition [by the Court] to 'a significant judicial tightening of the limits within which Congress may entrust anyone with lawmaking power.'"¹¹⁴

Further manifestations of such judicial tightening began to be expressed in Supreme Court cases dealing with statutory delegations involving personal liberties¹¹⁵ and in a variety of lower court cases.¹¹⁶ In the most notable of these

104. *See id.* at 543-48 (Rehnquist, J., dissenting).

105. *See id.* at 494.

106. *See id.* at 509.

107. *See id.* at 548.

108. 462 U.S. 919 (1983).

109. *See id.* at 944-59.

110. *See id.* at 983-89 (White, J., dissenting) (arguing that the Court has made a practice of upholding delegations to the Executive Branch and agencies which do not go through all the proper channels of the legislative process).

111. *See id.* at 951-54.

112. *See id.* at 953 n.16.

113. *See id.* at 952-54.

114. Schoenbrod, *supra* note 10, at 1235-36 (quoting Laurence Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 17 (1984)).

115. *See United States v. Robel*, 389 U.S. 258 (1967). The Court was faced with a challenge to the Subversive Activities Control Act of 1950 that prohibited people, defined as members of a "Communist-action organization," from being employed in any defense facilities. The majority used First Amendment grounds to determine the delegation was unconstitutional. *See id.* at 267-68.

cases, *South Dakota v. United States Department of Interior*,¹¹⁷ the Eighth Circuit Court of Appeals decided that a section of the Indian Reorganization Act (IRA), which authorized the Secretary of the Interior to acquire land for Native Americans in trust, was an unconstitutional delegation of legislative power.¹¹⁸ The Supreme Court granted the Department of Interior's petition for certiorari, vacated the opinion, and remanded to the Eighth Circuit with instructions to vacate the district court's decision and to remand the case back to the Secretary of the Interior for reconsideration.¹¹⁹ In so doing, the Court did not take the opportunity to weigh in on the issue of whether the delegation was an unconstitutional grant of legislative power.¹²⁰ This has led one commentator to conclude that no court, even on identical facts, would be likely to follow the Eighth Circuit opinion because of the Supreme Court's "near abandonment" of the doctrine.¹²¹

These cases indicate that the courts have become less concerned with the original form of the doctrine, which monitored all delegations of legislative power, and have instead began to express the concept that the nondelegation doctrine only allows delegations where there are judicial limitations placed on the agency's power by the terms of the statute. As one commentator has observed, "Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits."¹²² It seems it was this concept that came to life in the D.C. Circuit's *American Trucking* decision.

II. FACTUAL BACKGROUND OF *AMERICAN TRUCKING*

A. *The EPA's Duties Under the Clean Air Act*

Since the passage of the 1970 Clean Air Act (CAA), Congress has granted authority to the EPA to establish and revise the national ambient air quality standards (NAAQS). The standards set the permissible level of pollutants to which the public can be exposed in the outside air.¹²³ In regards to air pollutants

Conversely, Justice Brennan would have found the delegation unconstitutional because it represented a vague delegation that impeded fundamental rights. *See id.* at 275 (Brennan, J., concurring).

116. *See Massieu v. Reno*, 915 F. Supp. 681 (D.N.J. 1996), *rev'd*, 91 F.3d 416 (3d Cir. 1996).

117. 69 F.3d 878 (8th Cir. 1995).

118. *See id.* at 885.

119. *United States Dep't of Interior v. South Dakota*, 519 U.S. 919, 919-20 (1996).

120. *See id.*

121. Sunstein, *supra* note 6, at 335.

122. Farina, *supra* note 14, at 487 (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.) (en banc) (Leventhal, J., concurring), *cert. denied*, 426 U.S. 941 (1976)). Farina observes that Judge Leventhal "aptly characterized the course of nondelegation theory in the courts." *Id.*

123. *See* 42 U.S.C. § 7409(b) (1995).

that fall under the provisions of the CAA,¹²⁴ the EPA is charged with setting a "primary ambient air quality standard[] . . . requisite to protect the public health."¹²⁵ The CAA provisions have been read to require the EPA to consider only public health when setting the air quality standards.¹²⁶ Once the EPA determines that a pollutant reasonably endangers public health or welfare and sets the permissible level of exposure, the Act requires the EPA to re-examine the NAAQS every five years and, if necessary, revise them.¹²⁷

The EPA has asserted that the improvement in air quality standards has led to the prevention of at least 45,000 deaths, 13,000 heart attacks and 7000 strokes annually.¹²⁸ However, as air quality standards become stricter, the more difficult and expensive the emissions control measures are likely to be for the creators of air pollution.¹²⁹ Thus, any change to the air quality standards will have a pronounced effect on the nation's economy, leaving the EPA susceptible to legal challenges regardless of whether it lowers the standards, raises them, or leaves them unchanged.¹³⁰ Car manufacturers, power producers and industry in general have been strictly opposed to the raising of the standards, while environmental groups are constantly pressuring for stricter air quality standards.¹³¹ Due to the scrutiny and opposition that accompanies any revision of the standards, the EPA has been reluctant to revisit the NAAQS, even though the CAA commands that the standards be reviewed every five years.¹³²

B. EPA's 1997 Revision of the NAAQS

In 1993, the American Lung Association sought and received an order from the Arizona District Court that required the EPA to complete its review of the air

124. See *id.* §§ 7408-09.

125. *Id.* § 7409(b). Although the provisions in the CAA do not provide for an "adequate margin of safety" for the secondary air quality standards, the secondary standards are envisioned "to be more stringent than the primary ones." Sunstein, *supra* note 6, at 314.

126. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1040 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001).

127. See 42 U.S.C. §§ 7408(a)(1)(A), 7409(d)(1) (1995). To determine if a revision is necessary the EPA must again determine whether the new standard is "requisite to protect the public health" with an "adequate margin of safety." *Id.* § 7409(b)(2).

128. See J. CLARENCE DAVIES & JAN MAZUREK, *POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM* 130 (1998).

129. See Oren, *supra* note 6, at 10654.

130. See Sunstein, *supra* note 6, at 322.

131. See *id.*

132. See 42 U.S.C. § 7409(d) (1995); *Env'tl. Def. Fund v. Thomas*, 870 F.2d 892 (2d Cir.) *cert. denied sub nom.* *Ala. Power Co. v. Env'tl. Def. Fund*, 493 U.S. 991 (1989) (holding that the EPA has a nondiscretionary obligation under § 7409(d) to decide every five years whether to revise air quality standards, but Act does not require EPA to revise the standards).

quality standards.¹³³ The court, over strong objections from the EPA, ordered the agency to issue a new final rule for publication in the Federal Register by January 31, 1997.¹³⁴ The case resulted in the EPA issuing its 1997 revisions of the air quality standards, which lowered the threshold for both the ozone and particulate matter.¹³⁵ The costs associated with achieving compliance with the new standards by the year 2010 range from the EPA's conservative annual direct cost of \$9.6 billion for ozone and \$37 billion for particulate matter, to the critics' estimates of \$90 billion to \$150 billion annually.¹³⁶

Because the new air quality standards require further reduction by generators of both ozone and particulate matter, millions of activities and business practices would be directly affected by the tightening of such emissions.¹³⁷ As the effects of these revisions became widely publicized, numerous parties filed petitions in the D.C. Circuit Court of Appeals for review of the 1997 NAAQS.¹³⁸ The primary thrust of these challenges to the air quality standards questioned the accuracy of the scientific data the EPA used to support its promulgations.¹³⁹ Additionally, some small business owners further challenged the EPA's interpretation of sections 108 and 109 of the CAA, arguing that the EPA had construed the statute in a manner that rendered it an unconstitutional delegation of legislative power.¹⁴⁰ It was this additional challenge to the CAA that proved to be the most noteworthy issue addressed by the court in *American Trucking*.

In examining the controversy surrounding the EPA's air quality standards, the D.C. Circuit Court diverged from the usual practice of upholding broad congressional delegations by remanding the air quality standards back to the EPA with instructions to develop an intelligible principle that limited the Agency's discretion in promulgating the NAAQS.¹⁴¹ In so doing, the court revived the nondelegation doctrine, and held that the EPA's interpretation of the CAA was an unconstitutional delegation of legislative power.¹⁴² Although the court did not find the CAA unconstitutional, it did hold that if the EPA could not come up with

133. See *Am. Lung Ass'n v. Browner*, 884 F. Supp. 345 (D. Ariz. 1994).

134. See *id.* at 349.

135. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856.

136. See Lucinda Minton Langworthy, *EPA's Air Quality Standards for Particulate Matter and Ozone: Boon for Health or Threat to Clean Air Act?*, 28 ENVTL. L. REP. 10502, 10507 (1998).

137. See Oren, *supra* note 6, at 10655.

138. Electric utilities, industrial interests, a trucking association, and several Midwestern states challenged the validity of the new air quality standards. See Kevin B. Covington, *Federal Appellate Court Revives the Nondelegation Doctrine in Environmental Case*, 73 FLA. B.J. 81, 81 (1999).

139. See *id.*

140. See *id.*

141. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001).

142. See *id.* at 1033, 1037-38.

an intelligible principle to cabin its discretion, it would have to petition Congress for ratification of its standards.¹⁴³ The decision shocked the legal community and raised a host of important questions. Primarily, commentators and observers queried whether *American Trucking* represented a revival of the nondelegation doctrine,¹⁴⁴ a new form of the doctrine,¹⁴⁵ or some totally different doctrine.¹⁴⁶

C. Explanation of American Trucking

The *American Trucking* panel's decision proved to be quite controversial within the legal community. Then EPA Administrator Browner has branded the court's decision as "extreme, illogical and bizarre."¹⁴⁷ Professor Craig Oren dismissed the court's decision as "rhetorical flourish,"¹⁴⁸ and still others viewed the case as requiring the EPA to openly consider a cost-benefit analysis when setting air quality standards.¹⁴⁹ Another prominent interpretation was that the panel revived the nondelegation doctrine of the New Deal Era, endangering all environmental regulations.¹⁵⁰ The Supreme Court put an end to this view by reversing the panel's decision based on the Court's view that no precedent supported the idea of an agency being able to cure an unconstitutional delegation.¹⁵¹ The Court dismissed the panel's attempt at creating a new form of the nondelegation doctrine and reenforced the view that broad congressional delegations will continue to be upheld.¹⁵²

This Note views the decision in yet a different light and argues that the panel properly aimed to expand the concept of the nondelegation doctrine as a method to judicially limit unbridled agency authority.¹⁵³ Further, this Note argues that the Supreme Court erred in reversing the decision because the panel's opinion is rooted in both precedent and the underlying principles of the nondelegation doctrine that the Court chose to ignore. However, before discussing how the *American Trucking* decision extends this method of instituting limitations on agency regulatory authority, the panel's reasoning and holding must be understood.

143. See *id.* at 1040.

144. See Covington, *supra* note 136, at 81-83; Oren, *supra* note 6, at 10654, 10658-59.

145. See generally Sunstein, *supra* note 6, at 340-49.

146. See generally *id.* at 349-56; Recent Cases, *supra* note 6, at 1051-56.

147. Oren, *supra* note 6, at 10654.

148. *Id.*

149. See *id.*

150. See Linda Greenhouse, *An Arcane Doctrine Surprisingly Upheld*, N.Y. TIMES, May 15, 1999, at A11; Cass R. Sunstein, *The Court's Perilous Right Turn*, N.Y. TIMES, June 2, 1999, at A25.

151. See *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903, 912 (2001).

152. See *id.*

153. This view was first expressed by the prominent administrative law scholar, Kenneth Culp Davis and later expressed in *Amalgamated Meat Cutters*. See Davis, *supra* note 8, at 713-14; *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.C. Cir. 1971).

In *American Trucking*, the court deviated from its normal practice of granting discretion to an agency's interpretation of its enabling statute. Instead, the court used the nondelegation doctrine challenge as an excuse to closely examine the EPA's method of setting air quality standards for ozone and particulate matter.¹⁵⁴ The court took notice that both ozone and particulate matter were non-threshold pollutants, meaning that zero would be the only concentration level free of direct health effects.¹⁵⁵ Based on the non-threshold classification, the court held that before the EPA could pick any nonzero number, it must first explain why the degree of risk was acceptable.¹⁵⁶ In an effort to do so, the EPA explained to the court that prior to picking a nonzero number, it considered the size of the population affected, the possible severity of the effects, and the certainty of the effects of the pollutant when it revised the air quality standards.¹⁵⁷ Despite this explanation, the court did not find the factors sufficient and reasoned that "[t]he factors that EPA has elected to examine for this purpose [explaining why the degree of risk was permissible] in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much."¹⁵⁸ The court concluded that the factors the EPA offered for explanation did not themselves limit the agency's ability to choose any level for the air quality standards that it saw fit.¹⁵⁹

Although the court approved of the three factors the EPA used to assess the health effects for the non-threshold pollutants, it was unwilling to sustain the EPA's decision based on those factors. For the court, the problem was that the factors did not explain why the new ozone standard of .08 ppm would constitute the level that was "requisite . . . to protect the public health" with an "adequate margin of safety," whereas the ozone standards of .09 ppm or .07 ppm did not.¹⁶⁰ The court reasoned that the EPA was justifying its choice of air quality standards based on the intuitive argument that less pollution equals greater public benefit.¹⁶¹ Although certainly true, such an argument offered neither an intelligible principle that served to limit the EPA's discretion in setting the air quality standards nor a basis for judicial review.¹⁶²

The EPA argued that the .08 ppm standard was the optimal standard because anything lower would be closer to background levels of ozone.¹⁶³ From this dissent, Judge Tatel argued in his dissent that the EPA's revision of the air

154. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034-38 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001).

155. See *id.* at 1034.

156. See *id.*

157. See *id.* at 1034-35.

158. *Id.* at 1034.

159. See *id.*

160. *Id.* at 1034-35, 1034 n.1 (quoting 42 U.S.C. § 7409(b) (1995)).

161. See *id.* at 1036.

162. See *id.*

163. See *id.*

quality standards “ensured that if a region surpasses the ozone standard, it [will] do so because of controllable human activity, not because of uncontrollable natural levels of ozone.”¹⁶⁴ However, the majority attacked this reasoning, noting that it could just as easily be used to “justify a refusal to reduce levels below those associated with ‘London’s Killer Fog’ of 1952,”¹⁶⁵ because the higher the level chosen by the EPA, the more probable it is that it resulted from “controllable human activity” rather than “uncontrollable natural levels of ozone.”¹⁶⁶ Moreover, the court determined that Tatel’s assertion could not satisfy the necessary “intelligible standard” because the EPA has not adopted such a reading of the statute, and thus, it could not be used to defend its setting of the NAAQS.¹⁶⁷ The court concluded that neither the CAA nor the EPA’s interpretation of the CAA possessed the necessary intelligible principle to satisfy the nondelegation doctrine.

Under the old delegation doctrine, the court’s holding would have had the effect of invalidating sections 108 and 109 of the Clean Air Act. In this case, however, instead of invalidating the Act, the court remanded the air quality standards for review. The court concluded,

[w]here (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own.¹⁶⁸

The Court viewed the remand of the standards to the EPA as being consistent with two of the three underlying principles of the nondelegation doctrine.¹⁶⁹ The Court viewed the three functions of the nondelegation doctrine as being: 1) not to allow an agency to exercise delegated authority arbitrarily; 2) to allow for meaningful judicial review; and 3) to ensure that Congress makes the important social policy choices to the “extent consistent with orderly governmental administration.”¹⁷⁰

By requiring the agency to develop an intelligible principle, the court placed limits on the EPA’s authority for setting the NAAQS. The court found that such limitations would ensure that the regulatory authority would not be used arbitrarily.¹⁷¹ The court reasoned that these self-imposed limits would allow for

164. *Id.* at 1060 (Tatel, J., dissenting)

165. *Id.* at 1036.

166. *Id.*

167. *See id.* The court refrained from saying whether this would be a sound reading of the statute. *See id.* However, because the court found that the reasoning was flawed in that it allowed the EPA to justify practically any promulgated standard, one can reasonably conclude that the court would not approve of such a reading.

168. *Id.* at 1038.

169. *See id.*

170. *Id.* (quoting *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980)).

171. *See id.*

meaningful judicial review, which in turn would serve as a check on the agency's use of its regulatory authority.¹⁷² In short, the agency would set boundaries on its own authority, and the courts would make sure that the agency stayed within those boundaries. However, the court had difficulty justifying the remand in light of the third function of the doctrine, which seeks to ensure that Congress makes the important social policy choices.

One problem with a court instructing an agency to set an intelligible standard limiting its own regulatory authority is that the court directs the agency to make important social policy choices rather than allowing Congress to fulfill this legislative duty.¹⁷³ In sidestepping this problem, the *American Trucking* court seemed to address this issue by alluding that the third prong of the doctrine no longer needed to be satisfied. It reasoned:

The agency will make the fundamental policy choices. But the remand does ensure that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage. In any event, we do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine voiced in Justice Rehnquist's concurrence.¹⁷⁴

The court balanced Congress' need to delegate the performance of legislative duties with the separation of powers concept that legislative power must be confined to Congress. It is this former concern that made the nondelegation doctrine a nondoctrine. But as *American Trucking* illustrates, another solution exists. By instructing the EPA to define an intelligible principle to limit its authority, the court allowed the congressional delegation to stand because it did not invalidate the CAA. The court's ruling also ensures that the EPA would neither interpret the Act in a way allowing the agency to seize legislative power that Congress did not intend to delegate, nor violate the nondelegation doctrine.¹⁷⁵

The position, taken by the court in *American Trucking* marks the beginning of another shift in the evolution of the nondelegation doctrine. This Note views the case as standing for the proposition that courts are looking for ways to better monitor the regulatory power of agencies, while still allowing Congress to delegate to the extent that it does presently. Unfortunately, the Supreme Court failed to agree with this view.

172. *See id.*

173. *See* Sunstein, *supra* note 6, at 350-51; Oren, *supra* note 6, at 10661.

174. *Am. Trucking*, 175 F.3d at 1038 (citing *Indus. Union Dep't*, 448 U.S. at 607 (Rehnquist, J., concurring)).

175. *See Indus. Union Dep't*, 448 U.S. at 651. On its way to tightly construing the statute, the Court held that the agency interpretation of its enabling statute was invalid because it would have violated the nondelegation doctrine and Congress could not have intended to delegate to this magnitude. *See id.*

III. THE SUPREME COURT SHOULD HAVE ADOPTED THE MAJORITY'S OPINION IN *AMERICAN TRUCKING*

The Supreme Court should have adopted the nondelegation doctrine as means of monitoring the regulatory power of agencies, because it is consistent with constitutional norms as well as the doctrine's underlying principles. The Supreme Court ignored the arguments in support of the nondelegation doctrine and the benefits of the doctrine being used as a tool that monitors and limits agency regulatory power. In so doing, the Court failed once again to protect the constitutional principles of the nondelegation doctrine.

In *Whitman v. American Trucking*, the Supreme Court held that "[s]ection 109(b)(1) of the CAA, which . . . requir[es] the EPA to set air quality standards at the level that is "requisite" . . . to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent."¹⁷⁶ The Court pointed to its past rulings on nondelegation doctrine challenges and concluded that the determinate criterion that the D.C. Circuit required was not necessary.¹⁷⁷ Further, the Court stated that it had "almost never second-guess[ed] Congress" and found no precedent in support for remanding a invalid delegation to an agency.¹⁷⁸ The Court reasoned that it had never suggested an agency could remedy an invalid delegation by adopting a narrow construction of the statute.¹⁷⁹ In fact, it viewed such a concept as "internally contradictory [because] [t]he very choice of which portion of the power to exercise . . . would itself be an exercise of the forbidden legislative authority."¹⁸⁰ While the Court cited its past decisions as support for finding a constitutional delegation was made to the EPA, it ignored the fact that the *American Trucking* doctrine furthered the nondelegation principles.

Although the nondelegation doctrine has long been considered a constitutional principle, the Court has been hesitant to enforce the doctrine because of Congress' need to delegate its authority.¹⁸¹ It is the goal of this section to assert that, instead of underenforcing and ignoring the constitutional principles underlying the nondelegation doctrine, as it did in *Whitman*, the Court should have adopted the *American Trucking* approach which judicially ties Congress' need to delegate to the doctrine and balances it with the three other underlying principles of the nondelegation doctrine.

A. *Underlying Principles of the Nondelegation Doctrine*

As the *American Trucking* court articulated, the nondelegation doctrine is charged with enforcing three principles. First, the doctrine insures that an agency

176. *Whitman v. Am. Trucking Assn's*, 121 S. Ct. 903, 914 (2001).

177. *See id.* at 913.

178. *Id.* (quoting *Mistretta v. United States* 488 U.S. 361, 416 (1989)).

179. *Id.* at 912.

180. *Id.*

181. *See id.* at 914; *see also* *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989).

will not exercise its delegated authority arbitrarily.¹⁸² Second, it ensures that meaningful judicial review of an agency's actions will be feasible.¹⁸³ Third, it ensures political accountability in the legislative process by ensuring that Congress is responsible for making important social policy decisions.¹⁸⁴ Despite these articulated rationales, a fourth principle has stopped the Court from using the doctrine in many situations. This principle has been characterized as a "practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."¹⁸⁵ Although this understanding is correct, it does not allow for delegations that give agencies unbridled discretion, and thus it is still necessary to place limits on the delegated authority to preserve the system of government embodied in the Constitution and envisioned by the Founders.¹⁸⁶ The *American Trucking* approach to the delegation doctrine serves as a way to balance all four of these principles in a manner that will allow reasonable and workable limits to be placed on agency regulatory authority.

B. Limiting Agency Authority Through Meaningful Judicial Review

By remanding the air quality standards back to the EPA with instructions to develop an intelligible principle to limit its regulatory authority, the *American Trucking* court ensured that the agency would not use its authority arbitrarily, and provided a method of ascertaining standards that would allow for meaningful judicial review.¹⁸⁷ Thus, the *American Trucking* doctrine allows Congress to grant broad delegations to agencies while requiring the agency to set out limiting standards if Congress has not clearly done so.¹⁸⁸ Without these limitations, a court could not conduct judicial review to make sure an agency was not arbitrarily using its regulatory authority; therefore, the delegation would be inconsistent with the principles of the nondelegation doctrine.

One criticism levied against the court's reasoning was that the court asked the agency to define the limiting factors instead of Congress. Observers argued that this method of ascertaining limitations on an agency's authority will not clarify the congressional intent in a manner that will allow for the judicial review required by the doctrine.¹⁸⁹ These same observers argue that Congress has laid out an intelligible standard in the Clean Air Act by requiring that the air quality standards be set to protect the public health.¹⁹⁰ Even those who argue against the

182. See *Am. Trucking*, 175 F.3d at 1038.

183. See *id.*

184. See *Am. Trucking*, 175 F.3d at 1038.

185. *Mistretta*, 488 U.S. at 372.

186. See Edwards, *supra* note 7, at 752.

187. See *Am. Trucking*, 175 F.3d at 1038.

188. See Sunstein, *supra* note 6, at 310.

189. See Recent Cases, *supra* note 6, at 1055.

190. See *id.* at 1054.

revival of the nondelegation doctrine, however, realize that such a standard does nothing to rein in the EPA's discretion in setting the standards.¹⁹¹ The public health standard has offered the court guidance in determining that it is Congress' intent to have the EPA set the air quality standards based solely on health considerations.¹⁹² Thus, the court in *American Trucking* already knew what Congress had intended for the agency to consider in setting the NAAQS.

For meaningful judicial review, however, the court also needed to know what factors the agency actually considered and what guidelines it used to determine the appropriate balance of health benefits as compared with the potential degree of risk.¹⁹³ If the EPA cannot ascertain such factors, there is no way for the court to determine whether the agency is complying with the congressional mandate to regulate in a manner that protects the public health. Thus, the Clean Air Act grants the EPA unrestricted authority that could easily be used arbitrarily because the court would be unable to limit the agency's ability to regulate air quality standards.¹⁹⁴

The nondelegation doctrine requires that regulatory actions be subject to meaningful judicial review. As long as Congress has made the policy choice of a principle that guides the agency in the proper use of its authority, it does not matter whether Congress or the agency sets the necessary boundaries that permit this review to take place. In this case, Congress made the policy choice of requiring the EPA to regulate in a manner that protects the public health. The public health standard does not limit the agency regulatory power or allow for meaningful review, so it is up to the agency to come up with an interpretation that is consistent with Congress's policy choice, limits its own authority, and provides a standard that allows a court to determine if the agency has acted arbitrarily.

C. Balancing Political Accountability with the Need to Delegate

In *American Trucking*, the panel held that to remand the case and allow the agency to "extract a determinate standard on its own," would not serve the third function of the nondelegation doctrine.¹⁹⁵ The court reasoned that instead of

191. See Oren, *supra* note 6, at 10664.

192. See *Am. Trucking*, 175 F.3d at 1038.

193. See *id.*

194. Although it could be argued that Congress itself would serve as a check on agency regulatory power, the delegation of such unrestricted power would prevent meaningful judicial review and remove the administrative branch from judicial actions. Thus, the court would be stripped of its duty to determine what is a proper delegation. As one commentator has said, "[t]he determination of whether Congress has rightly delegated authority to an administrative agency must be made by the courts, not Congress." Edwards, *supra* note 7, at 775. The arbitrary and capricious standard of review would similarly fail as a check on agency power, because the court would be unable to determine if the agency acted arbitrarily without standards that reveal when the EPA can act.

195. *Am. Trucking*, 175 F.3d at 1038.

Congress, the agency would be making fundamental policy choices.¹⁹⁶ Although the court's reasoning has merit, it ignores the fact that the third prong of the doctrine requires Congress to make the fundamental policy choices in order to increase political accountability in the legislative process.¹⁹⁷ Phrasing the inquiry in terms of accountability, it becomes evident that the *American Trucking* nondelegation doctrine does serve the third function of the doctrine by increasing the accountability of the legislative process as a whole.

The Constitution entrusts Congress with the lawmaking authority because it is directly accountable to the people through the electoral process; moreover, the nondelegation doctrine serves to ensure that this accountability will always be present in the legislative process.¹⁹⁸ Thanks to an ever expanding central government, however, Congress has been required to delegate its legislative authority, and courts have responded by upholding broad delegations in order to allow Congress to meet its governmental responsibilities.¹⁹⁹ Consequently, the nondelegation doctrine has been rarely invoked and accountability in the legislative process has withered away.²⁰⁰ Agency heads are not held politically responsible for their actions, because they are appointed rather than elected and are subjected to only limited review by their appointers.²⁰¹ In essence, the congressional need to delegate has trumped the doctrine's purpose of ensuring political accountability. Therefore, it should not matter whether the *American Trucking* version of the doctrine ensures political accountability in the legislative process, because the original form of the delegation doctrine did not.²⁰² Rather, by characterizing the inquiry in terms of ensuring political accountability in the legislative process as a whole, one can conclude that the *American Trucking* nondelegation doctrine better achieves this goal than older manifestations of the doctrine.²⁰³

Although Congress' need to delegate overran the original form of the nondelegation doctrine, the *American Trucking* doctrine balances this congressional need with the doctrine's underlying principles in order to ensure that the legislative process will be subject to an increased level of political accountability. By exposing agencies to nondelegation challenges, courts will provide a forum for agencies to be held accountable to the public.

By strengthening the air quality standards, the EPA made a regulatory decision that affected the entire nation.²⁰⁴ The public responded by bringing legal challenges against the EPA's evidentiary findings and its regulatory

196. *See id.*

197. *See generally* William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority over Regulations*, 20 CARDOZO L. REV. 939, 940-45 (1999).

198. *See* *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989).

199. *See* Covington, *supra* note 136, at 82-83.

200. *See* Schoenbrod, *supra* note 10, at 1238-46.

201. *See* Sunstein, *supra* note 6, at 338.

202. *See* Schoenbrod, *supra* note 10, at 1246.

203. *See* 1 KENNETH DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.75 (2d ed. 1978).

204. *See* Oren, *supra* note 6, at 10657-58.

authority.²⁰⁵ Environmental groups responded in defense of the agency and the Court of Appeals for the District of Columbia heard both sides of the political and legal debate.²⁰⁶ Such a description of the case sounds like a process which should be taking place in the legislative branch rather than the courts. However, because courts recognize the need for Congress to delegate, courtroom challenges provide the most effective means for the public to hold agencies politically responsible for regulatory acts.²⁰⁷ More troubling than having political debates taking place in courtrooms is that the courts have compromised one of the public's strongest weapons in holding rule promulgators accountable by granting agencies broad delegations of legislative authority.²⁰⁸ Courts would rather uphold these delegations than void a congressional act that has passed through all the channels of the lengthy legislative process.²⁰⁹

One of the most unattractive features of the old delegation doctrine was that it required courts to strike down a congressional act. The *American Trucking* doctrine solves this problem by remanding the erroneous agency interpretation, rather than eradicating the entire act.²¹⁰ Further, if the agency cannot come up with an interpretation of the act that does not violate the doctrine, then it must return to Congress for ratification of the agency's interpretation or to develop a nonviolative interpretation.²¹¹ In this regard, the courts serve as the voice of the public in ensuring that the entire legislative process is held politically accountable.

The *American Trucking* approach to the doctrine is not without its critics. One objection shared by observers is that the arbitrary and capricious standard of review could have resolved the controversy in *American Trucking* better than the nondelegation doctrine.²¹² Such critics believe the court used the delegation doctrine as an easy way to distinguish this case from its past decisions that would have upheld the EPA's ability to use its discretion in setting standards within a relevant range of options.²¹³ However, these observers ignore the benefits of using the nondelegation doctrine as an increased level of scrutiny instead of the

205. See Covington, *supra* note 136, at 81.

206. See *id.*

207. See generally Schoenbrod, *supra* note 16, 1242-46.

208. See *McGautha v. California*, 402 U.S. 183, 271-87 (1971) (Brennan, J., dissenting); *Yakus v. United States*, 321 U.S. 414, 423 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.C. Cir. 1971).

209. See Aranson et al., *supra* note 7, at 16-17 (arguing that the Court's experimentation with delegation doctrine was short lived because of doctrine's requirement that challenged legislation be deemed void).

210. See Sunstein, *supra* note 6, at 309-10.

211. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1040 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001).

212. See Oren, *supra* note 6, at 10657-59; *Am. Trucking Ass'ns v. EPA*, 195 F.3d at 14-16 (Silberman, J., dissenting).

213. See Oren, *supra* note 6, at 10663; *Am. Trucking*, 175 F.3d at 1037.

arbitrary and capricious standard. The arbitrary and capricious standard only allows a court to criticize an agency's decision, while the nondelegation doctrine allows the court to require the agency to develop standards it must follow when regulating, and it calls Congress to reinterpret its legislative delegation.²¹⁴ Such a call will, in turn, increase the consistency and reflectiveness involved in agency decisions, making administrative rulemaking more effective.²¹⁵ Although the *American Trucking* nondelegation approach increases the likelihood of well-informed and consistent regulatory action, it does appear to give the judiciary branch power that it is not authorized to possess.

Others have criticized that the Court of Appeals for the District of Columbia for developing a test for unconstitutional delegations that it had neither the authority to enforce nor the authority to require other courts to follow.²¹⁶ As a result, courts may ignore constitutional principles and base their decisions on their own policy preferences.²¹⁷ However, this argument ignores three important principles. First, Supreme Court precedent utilizes the nondelegation doctrine to narrowly construe legislation in order to find that a legislative delegation did not violate the doctrine.²¹⁸ From such precedent, it is apparent that the Court reasoned that Congress could not have intended to delegate legislative authority that constituted a violation of the nondelegation doctrine.²¹⁹ Second, there is the general constitutional principle that whenever possible, statutes should be construed so as to be constitutional.²²⁰ Finally, it is generally accepted that Congress should be allowed to make broad delegations of power.²²¹

When these three principles are examined in conjunction with the delegation doctrine, rules become evident that will guide a court in addressing a delegation challenge. First, a court should try to construe the statute in a manner that constrains agency authority by allowing meaningful judicial review. If the court cannot construe the statute in such a manner, then the court should determine whether the agency can use its expertise to limit its own authority, thus complying with Congress' broad delegation and serving the purposes of the delegation doctrine. Only after the agency has failed to establish such a standard will the court find the statute unconstitutional. As a final check on the court's power of review, Congress can act as the final arbitrator with the ability to overrule the court's decision through legislation. Because the authority for the *American Trucking* doctrine rests in these recognized principles, any argument that the judiciary is trying to seize unauthorized power must fail.

214. See *Am. Trucking*, 175 F.3d at 1040 (suggesting that EPA return to Congress to address revision of air quality standards).

215. See Sunstein, *supra* note 6, at 350.

216. See *Recent Cases*, *supra* note 6, at 1056.

217. See *id.*

218. See, e.g., *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981); *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *Kent v. Dulles*, 357 U.S. 116 (1958).

219. See *Indus. Union Dep't*, 448 U.S. at 651.

220. See, e.g., *Kent*, 357 U.S. at 129-30.

221. See *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989).

In *American Trucking*, the court employed these constitutional principles to increase legislative accountability. The public sought to hold the agency accountable for its action by raising a nondelegation doctrine challenge, arguing that the EPA has interpreted the CAA in a manner that constitutes an unconstitutional delegation of power. Based on the principles that Congress would not have intended to delegate authority in violation of the doctrine and that the statutes are mandated to regulate in a manner which protects the public health, the court interpreted the statute in a way that constrained the EPA's regulatory power.²²² After determining that the EPA could not come up with such an interpretation, the court did not invalidate the CAA because such an action would violate the understanding that Congress must be allowed to delegate in order to accomplish all of its legislative duties.²²³ Instead, the court remanded the air quality standards to the EPA and instructed the agency to use its expertise to come up with an intelligible standard that limits its regulatory authority.²²⁴

The EPA was then faced with the option of either returning to Congress to have its air quality standards ratified or using its expertise to come up with an intelligible standard. If the agency went to Congress, Congress would have been forced to address the issue, thus increasing accountability through the legislative process.²²⁵ If the agency used its expertise to come up with an intelligible standard defining the appropriate balance between health benefits and potential risks that allow regulation, the administrative process would have become more consistent and reflective in nature.²²⁶ Either way, the accountability of the legislative process will be increased. Thus, by using statutory construction principles to balance Congress' need to delegate with the accountability principle of the nondelegation doctrine, the *American Trucking* court had constructed a test that would allow courts to enforce, rather than ignore, the underlying constitutional principles that the nondelegation doctrine represents. The Supreme Court chose to ignore how the panel's decision promoted limiting agency authority through meaningful judicial review and increasing the accountability of the legislative process while recognizing Congress' need to make broad delegations. Thus, the Court chose to ignore, yet again, the constitutional principles underlying the nondelegation doctrine.

CONCLUSION

While these principles show that the *American Trucking* doctrine is grounded in constitutional principles, it does not answer the Supreme Court's argument that there is no support for remanding an unconstitutional delegation to an

222. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001).

223. See *id.* at 1038.

224. See *id.* at 1040.

225. See Schoenbrod, *supra* note 10, at 1243-46.

226. See Sunstein, *supra* note 6, at 350.

agency for the purpose of coming up with a limiting construction.²²⁷ However, Supreme Court cases have advanced the theories that the nondelegation doctrine require the courts to narrowly construe statutes, because it is presumed that Congress does not intend to make unconstitutional delegations.²²⁸ Thus, it is not a new idea to narrowly construe congressional statutes to ensure that Congress can continue to delegate.

Until *American Trucking*, courts served as the body responsible for narrowly constraining the statutes. As a result, the nondelegation doctrine and its underlying policies of preventing arbitrary use of agency power through meaningful judicial review and promoting accountability have been ignored.²²⁹ The Supreme Court held that it had never required a statute to have a "determinate criterion" for which *American Trucking* searched.²³⁰ However, looking at Supreme Court precedent, it has never really enforced the underlying principles of the doctrine either. As one scholar stated "[t]he Supreme Court's application of the delegation doctrine, by way of an amorphous and ultimately meaningless definition of legislative power undercuts the accountability the Constitution seems to protect."²³¹ Looking at the history of the Court in last 200 years, it does not just seem to undercut accountability, it clearly fails at promoting any of the doctrine's underlying principles.

By allowing courts to place agencies in the position of narrowly construing congressional delegations, the Supreme Court could have restored meaning to the nondelegation doctrine and in so doing, would have increased the accountability of the legislative process as a whole while ensuring a more meaningful judicial review to monitor agency discretion. The idea of having a body other than Congress narrowly construe its delegations is well supported by Supreme Court precedent, and the added benefits of balancing the need of Congress to delegate legislative authority with the doctrine's underlying principles justifies the panel's decision in *American Trucking*.

The nondelegation doctrine has had little effect on enforcement of the separation of powers principle on which this country's government was founded. Supreme Court precedent supports the premise that the Court does nothing more than acknowledge the principles that underlie the doctrine.²³² In its last two opinions addressing a challenge based on the doctrine, the Court refused to revive the doctrine as a check on grants of legislative power.²³³ The Court held in *Mistretta v. United States* that "in our increasingly complex society, replete with ever changing and more technical problems" Congress could not do its job

227. See *Whitman*, 121 S. Ct. at 912.

228. See *supra* notes 210-11 and accompany text.

229. See Schonbrod, *supra* note 16, at 1237 (arguing that "[d]espite the adequacy of what the Court says about delegation it nonetheless asserts what it does in practice fulfills the doctrine's purposes. The Court is wrong.").

230. *Whitman*, 121 S. Ct. at 913.

231. *Id.* at 1246.

232. See discussion *supra* Part I.A-B.

233. See *Whitman* 121 S.Ct. at 914; *Mistretta*, 488 U.S. at 371.

without being able to make broad delegations.²³⁴

The Supreme Court should have adopted the *American Trucking* doctrine as a solution to the problem of enforcing the nondelegation doctrine, while still allowing Congress to make broad delegations of legislative authority. The proposed doctrine emphasizes construing statutes to ensure they include limits on agency regulatory authority. These limits will not hold agencies accountable for their decisions but will place Congress on notice that it may have to reconsider its legislative delegation if it does not statutorily restrict the agency or if the agency cannot establish self restrictions. In short, the proposed delegation doctrine increases the accountability of the legislative process as a whole, ensures that an agency will not use its authority arbitrarily, and ensures meaningful judicial review without detracting from Congress' ability to delegate. The proposed delegation doctrine allows courts to balance these constitutional concerns in a manner that protects the integrity of the separation of powers principle. The Supreme Court ignored these policies in *Whitman* and as result, ensured that courts will continue to pay only lip service to the nondelegation doctrine and ignore the principles upon which this country was founded. The Supreme Court erred in not adopting *American Trucking*, thus allowing congressional delegations to continue to go unchecked.

234. See *Mistretta*, 488 U.S. at 372.

STATUTORY RAPE AS A CRIME OF VIOLENCE FOR PURPOSES OF SENTENCE ENHANCEMENT UNDER THE UNITED STATES SENTENCING GUIDELINES: PROPOSING A LIMITED FACT-BASED ANALYSIS

JENNIFER RILEY*

INTRODUCTION

Currently the United States circuit courts disagree whether statutory rape¹ is a “crime of violence” for purposes of sentence enhancement under the United States Sentencing Guidelines (USSG).² The USSG provide for a sentence enhancement for “career offenders.”³ Defendants who have two prior convictions for “crimes of violence” qualify for “career offender” status.⁴ Courts also disagree as to which method should be used in determining whether a statutory rape conviction constitutes a crime of violence.⁵

The disparity among the circuits contravenes the goals of the United States Sentencing Guidelines. Furthermore, the different methods used by the circuits when making such determinations are flawed in that they lead to unfair results and waste judicial resources. This Note will propose a method by which courts can make crime of violence determinations that will fairly serve the goals of the

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1. For purposes of this Note, statutory rape is defined as sexual intercourse between an adult and a child. Statutes that include force as an element are not considered statutory rape laws in this Note. Not all statutes that prohibit sexual intercourse between an adult and a child are titled, “statutory rape.” A variety of names are used for this conduct, including lascivious acts with children, sexual assault, and rape. For an overview of statutory rape laws in the United States, see Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 41-77 (1997). The Model Penal Code’s approach to sex crimes against children distinguishes between sexual penetrative offenses and contact offenses. See MODEL PENAL CODE §§ 213.1-4 (1980). Under the Model Penal Code, a male who engages in sexual intercourse with a female less than ten years old is guilty of felony rape, the most serious penetration offense in the Model Penal Code. See *id.* § 213.1. The Model Penal Code also makes it an offense to have sexual intercourse with a child under sixteen when the offender is more than four years older than the victim. See *id.* § 213.3(a). Under the Model Penal Code, it is an offense to have sex with a person under twenty-one years of age when that person is a ward of the offender. See *id.* § 213.3(b). The provisions of the code that set forth the sexual contact offenses mirror the provisions describing the sexual penetrative offenses. See *id.* § 213.4. For a discussion of the Model Penal Code’s approach to sex crimes against children, see Phipps, *supra*, at 17-26.

2. United States v. Riley, 183 F.3d 1155, 1160 n.11 (9th Cir. 1999) (noting split).

3. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (1998).

4. *Id.*

5. See, e.g., United States v. Bauer, 990 F.2d 373 (8th Cir. 1993) (using the categorical method); United States v. Shannon, 110 F.3d 382 (7th Cir. 1996) (en banc) (using the intermediate approach).

USSG, promote fairness to defendants, and conserve judicial resources.

Part I of this Note will describe the federal sentencing scheme prior to the promulgation of the USSG and the problems Congress identified in the old sentencing scheme. Part I will then discuss of the USSG and examine the guideline provisions that are pertinent to this discussion. Part II will discuss the three approaches courts employ when determining whether a prior statutory rape conviction is a crime of violence. It will then compare these approaches and discuss the strengths and weaknesses of each approach. Finally, Part III will propose a new method for making crime of violence determinations. This new method, referred to as the limited fact-based approach, alleviates many of the problems found in the approaches currently used by the courts. Part III will also discuss how the facts to be considered in this new method indicate whether a crime of violence has occurred. This Note will then discuss the benefits and anticipated criticisms of the limited fact-based approach.

I. THE SENTENCING GUIDELINES

Prior to the introduction of the federal sentencing guidelines, the federal criminal sentencing system was based largely on the rehabilitation model of punishment.⁶ "The judge [was] supposed to set the maximum term of imprisonment and the Parole Commission [was] supposed to determine when to release the prisoner because he is 'rehabilitated.'"⁷ The law did not contain a general sentencing provision; it merely pronounced the "maximum term of imprisonment and the maximum fine for each Federal offense in the section that describes the offense."⁸ However, over time federal sentencing judges and the Parole Commission abandoned the rehabilitation model of punishment.⁹ As a result, sentencing judges were left with unfettered discretion to sentence criminals based on their own notions of the purposes of sentencing.¹⁰ This unfettered discretion resulted in federal judges giving "offenders with similar histories, convicted of similar crimes, committed under similar circumstances" an unjustifiable wide range of sentences.¹¹ Because of the disparity in sentences

6. See Comprehensive Crime Control Act of 1984, REP. NO. 98-225, 98th Cong., 2d Sess. 37 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

7. *Id.*

8. *Id.* at 39, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3222.

9. See *id.* at 40, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3223. "[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Id.* at 38, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

10. See *id.*, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

11. *Id.* This disparity is shown by a study conducted in the Second Circuit in 1974. In this study, fifty district court judges were given twenty identical cases and asked to impose sentences for the offenders in those cases. The offenses in these cases were representative of the offenses seen in the district courts of the Second Circuit. The study found large disparities in the sentences imposed by the different judges in identical cases. For example, in a case concerning extortionate

imposed by judges and the second guessing that occurred between sentencing judges and parole officials, “prisoners and the public [were] seldom certain about the real sentence a defendant [would] serve.”¹²

In response to the problems created by this system of sentencing, Congress implemented sentencing reform in the Comprehensive Crime Control Act of 1984.¹³ This reform introduced the first comprehensive federal sentencing law.¹⁴ The goals for this sentencing reform legislation included assuring that “sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all Federal criminal cases.”¹⁵ Congress also intended that the sentencing legislation “assure that the offender, the Federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it.”¹⁶

The Sentencing Reform Act of 1984, included in the Comprehensive Crime Control Act of 1984, created the United States Sentencing Commission.¹⁷

credit transactions and income tax violations, the most severe sentence imposed was twenty years in prison and a \$65,000 fine. The median sentence imposed by the judges was ten years in prison and a \$50,000 fine. The least severe sentence imposed was three years in prison. See Comprehensive Crime Control Act of 1984, H.R. REP. NO. 98-225, 98th Cong., 2d Sess. 37, 41-44 n.22 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3224-3227.

12. *Id.* at 39, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3222.

13. See *id.* at 37, *reprinted in* 1984 U.S.C.C.A.N. 3220.

14. See *id.* This new sentencing law was the “culmination of a reform effort begun more than a decade [earlier] by the National Commission on Reform of Federal Criminal Laws” as well as by many notable judges, professors, and senators. *Id.*

15. *Id.* at 39, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3222.

16. *Id.* In total, five goals were stated for the legislation. Two goals are stated in the text above. The remaining are:

First, sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served by the sentencing system and a clear statement of the kinds and lengths of sentences available for Federal offenders.

...

[The legislation] should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case.

...

[Finally, the legislation] should assure that each stage of the sentencing and corrections process, from the imposition of sentence by the judge, and as long as the offender remains within the criminal justice system, is geared toward the same goals for the offender and for society.

Id.

17. See 28 U.S.C. § 994(a) (1994). The United States Sentencing Commission consists of seven voting members and one nonvoting member. The President appoints the voting members with the advice and consent of the Senate. At least three of the members are federal judges chosen by the President from a list of judges recommended by the Judicial Conference of the United States. See 28 U.S.C. § 991(a) (1993).

Congress's stated purpose in establishing the Sentencing Commission was to provide "adequate deterrence to criminal conduct . . ." and "protect the public from further crimes of the defendant."¹⁸ The purposes of the Sentencing Commission also include establishing sentencing policies and practices that "provide certainty and fairness in meeting the purposes of sentencing [and] avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."¹⁹

The Sentencing Commission developed the USSG, which took effect on November 1, 1987.²⁰ The USSG provide a suggested sentence, based in part on the defendant's criminal history.²¹ Under the guidelines, "career offenders" receive enhanced sentences.²²

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.²³

When a defendant in federal court meets the first two requirements of the "career

18. 18 U.S.C. § 3553(a)(2)(B)-(C) (1993). There are four purposes for sentencing set forth in 18 U.S.C. § 3553(a)(2). Two of the purposes are stated above. The other two stated purposes of sentencing are "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.* § 3553(a)(2)(A), (C).

19. 28 U.S.C. § 991(b)(1)(B) (1993). This section further states that the Commission is to establish sentencing policies that provide certainty, fairness, and avoid unwarranted sentencing disparities but maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." *Id.*

20. See Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1575-76 (1997). Although the guidelines were enacted on November 1, 1987, they did not go into effect nationally until 1989 when they successfully withstood constitutional challenges. See *United States v. Mistretta*, 488 U.S. 361 (1989).

21. See Comprehensive Crime Control Act, H.R. REP. NO. 98-225, at 78-79, *reprinted in* 1984 U.S.C.C.A.N. 3261-62.

22. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (1998). See U.S. SENTENCING GUIDELINES ch.4, pt. A, introductory cmt. at 283 (1998):

A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered.

23. *Id.* § 4B1.1.

offender” definition, the sentencing judge must then look to the defendant’s prior convictions to determine if the convictions were for crimes of violence or controlled substance offenses. A crime of violence is defined in the USSG as:

any offense under federal or state law punishable by imprisonment for a term exceeding one year, that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.²⁴

The courts consider the latter part of this provision, consisting of the “otherwise” clause, when determining whether a particular conviction for statutory rape is a conviction for a crime of violence.

II. STATUTORY RAPE AS A CRIME OF VIOLENCE

When the statutory rape statute under which a defendant is convicted does not contain use, attempted use, or threatened use of physical force as an element, the court must decide whether the statutory rape conviction “involves conduct that presents a serious potential risk of physical injury to another” to determine if that conviction is a conviction for a crime of violence.²⁵ If the court finds that the conviction does involve “conduct that presents a serious potential risk of physical injury to another,” that conviction will be considered a conviction for a crime of violence.²⁶ Just as the federal circuit courts disagree on whether statutory rape satisfies the crime of violence provision,²⁷ they also disagree on the appropriate method for making this determination.²⁸

“Courts deciding whether statutory rape convictions should be considered crimes of violence . . . face[] a wide variety of underlying state statutes. These statutes differ by name, relevant ages of both defendant and complainant, and type of conduct proscribed.”²⁹ This variety among statutory rape statutes may account for the variety of methods courts use for determining whether statutory rape is a crime of violence. There are three different approaches employed by the courts in determining this issue: the categorical approach, the intermediate approach, and the fact-based approach.³⁰

24. *Id.* § 4B1.2(a).

25. *See* *United States v. Sacko*, 178 F.3d 1 (1st Cir. 1999).

26. *See id.* at 2.

27. *See* *United States v. Riley*, 183 F.3d 1155, 1160 n.11 (9th Cir. 1999).

28. *See* Susan Fleischmann, Comment, *Toward a Fact-based Analysis of Statutory Rape Under the United States Sentencing Guidelines*, 1998 U. CHI. LEGAL F. 425, 428 (1998); *see also* Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205, 1213 (1998).

29. Bossing, *supra* note 28, at 1213.

30. *See* Fleischmann, *supra* note 28, at 428-29.

A. Court Approaches

Some courts use the categorical approach.³¹ Under this approach, a court looks solely to whether conduct that would lead to a conviction under the statute necessarily "presents a serious risk of physical injury to another."³² A court using this approach does not examine the defendant's actual conduct, but examines the minimum conduct necessary for a conviction under the statute.

Other courts use an intermediate approach,³³ where the sentencing court will consult more than just the statute in making crime of violence determinations. Courts using this approach examine the facts relating to the underlying conviction are contained in the charging papers, the indictment³⁴ or information,³⁵ when determining whether an offense involves conduct that presents a serious potential risk of physical injury to another.

The third approach used by courts is the fact-based approach.³⁶ Under this approach, courts examine any and all facts surrounding the prior conviction and do not limit their inquiry to any specific documents. Courts may review the record of the prior proceeding or may even hold evidentiary hearings to determine whether the previous conviction was for a crime of violence.

B. Comparison of the Approaches

Each approach has strengths, weaknesses, and varying degrees of support. This Note will discuss the strengths and weaknesses of each approach focusing on the extent to which each approach promotes efficiency, fairness, uniformity, and certainty in sentencing.

1. *Categorical Approach*.—This approach is supported by the only United States Supreme Court decision regarding crime of violence determinations, *Taylor v. United States*.³⁷ In *Taylor*, the Court considered whether a Missouri

31. See, e.g., *United States v. Bauer*, 990 F.2d 373 (8th Cir. 1993) (holding statutory rape is a crime of violence).

32. See *id.* at 374; see also *United States v. Rodriguez*, 979 F.2d 138 (8th Cir. 1992).

33. See, e.g., *United States v. Shannon*, 110 F.3d 382 (7th Cir. 1996).

34. An indictment is an "accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which by law is a public offense, punishable on indictment." BLACK'S LAW DICTIONARY 772 (6th ed. 1990).

35. An information is "an accusation exhibited against a person for some criminal offense, without an indictment." *Id.* at 779. An information differs from an indictment only "in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath." *Id.*

36. See, e.g., *United States v. Flores*, 875 F.2d 1110 (5th Cir. 1989). The Fifth Circuit upheld the district court's reliance on a pre-sentence report that was based on interviews of county clerks in determining if the defendant's burglary convictions were for burglaries of dwellings. See *id.* at 1112-13.

37. 495 U.S. 575 (1990).

conviction for second degree burglary was a conviction for a violent felony.³⁸ The Court ruled that in making such determinations, courts should “look only to the fact of conviction and the statutory definition of the prior offense.”³⁹ Examining a prior conviction for burglary, the Court ruled that sentencing courts should find that a violent felony occurred if the statute under which the defendant was convicted has the basic elements of, what the Court called, “generic burglary.”⁴⁰ Although the Court used a categorical approach, it was dealing with a conviction for burglary, one of the offenses that is enumerated in the statute. Therefore, the decision in *Taylor* does not instruct courts on how to determine whether crimes not enumerated in the statute are crimes of violence, nor does it explain how a court should determine if a defendant’s conduct “presents a serious potential risk of physical injury to another.”⁴¹

The Eighth Circuit uses the categorical approach when making crime of violence determinations. In *United States v. Rodriguez*,⁴² the court rejected the defendant’s request to examine the facts surrounding his prior statutory rape conviction.⁴³ The court ruled that a “sentencing court is not required to consider the underlying circumstances at the time of the crime in determining that a defendant has been convicted of a ‘crime of violence.’”⁴⁴ In *United States v. Bauer*,⁴⁵ the Eighth Circuit followed its decision in *Rodriguez* and found that a conviction for lascivious acts with children in violation of the Iowa law was per se a crime of violence.⁴⁶

The categorical approach promotes the conservation of judicial resources. The Court in *Taylor* noted the approach’s efficiency as a reason for preferring the

38. See *id.* at 578. The defendant had received an enhanced sentence under section 1402 of Subtitle I of the Anti-Drug Abuse Act of 1986, 18 U.S.C. § 924(e). Although the Court did not analyze a sentence enhancement under the sentencing guidelines, this case is relevant because the definition for “violent felony” in 18 U.S.C. § 924(e) does not significantly differ from the definition of “crime of violence” in the USSG. The only difference in the definitions is that burglary is enumerated as a violent felony in 18 U.S.C. § 924(e), whereas burglary of a dwelling is enumerated as a crime of violence under USSG section 4B1.2.

39. *Taylor*, 495 U.S. at 602.

40. *Id.* at 599.

41. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

42. 979 F.2d 138 (8th Cir. 1992).

43. See *id.* at 140-41.

44. *Id.*

45. 990 F.2d 273 (8th Cir. 1993).

46. See *id.* at 374-75. The court analyzed Bauer’s conviction under an Iowa law, which provided:

If any person ravish and carnally know any female by force or against her will, or if any person carnally know and abuse any female child under the age of sixteen years, or if any person over the age of twenty-five years carnally know and abuse any female under the age of seventeen years, he shall be imprisoned in the penitentiary for life, or any term of years, not less than five.

IOWA CODE § 698.1 (repealed 1976).

categorical approach to a factual approach.⁴⁷ Under the categorical approach, courts do not spend valuable time and resources retrying prior convictions.

However, this approach seems to sacrifice sentencing uniformity, fairness, and accuracy in exchange for efficiency. It does not promote the goal of uniform sentencing. For example, if two defendants engage in identical behavior in different jurisdictions, one defendant's conduct could be deemed a crime of violence and the other's not a crime of violence. This disparity results because, under this approach, the crime of violence determination is based upon the language of the statute under which the defendant was previously convicted, not the defendant's conduct. Moreover, this approach does not protect society from recidivist violent offenders. A defendant who engages in conduct "that presents a serious potential risk of physical injury to another"⁴⁸ could be given a lesser sentence than he should simply because, under the wording of the statutory rape statute, the "potential risk" was not inherent in the elements of the crime.

In addition to underinclusive results, the categorical approach may lead to overinclusiveness by giving enhanced sentences to defendants who are not recidivist violent offenders. The Iowa statutory rape law in *Bauer* provides a cogent example. The statute prohibited "any person [to] carnally know and abuse any female child under the age of sixteen years."⁴⁹ Under this statute, it is possible that a seventeen-year-old male could be convicted for having sex with his fifteen-year-old girlfriend. Because this conviction would be under section 698.1 of the Iowa Code, Eighth Circuit courts following *Bauer* would consider it a conviction for a crime of violence for purposes of sentence enhancement. Not only does this result seem unfair, but seventeen-year-old males having sexual relations with fifteen-year-old females with whom they are in a relationship are not the type of criminals the "career offender" provision was designed to target. Therefore, the categorical approach can result in enhanced sentences for defendants who pose no added threat to the public.⁵⁰

2. *Intermediate Approach.*—The Seventh Circuit used the intermediate approach in *United States v. Shannon*.⁵¹ In *Shannon*, the court, sitting en banc, refused to examine the complaint or hold evidentiary hearings to determine whether the defendant's conviction for second-degree sexual assault was a crime of violence.⁵² The court confined its examination of the defendant's conduct to the facts contained in the information.⁵³

47. See *Taylor*, 495 U.S. at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting.").

48. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

49. IOWA CODE § 698.1 (repealed 1976).

50. See Bossing, *supra* note 28, at 1205; see also Fleischmann, *supra* note 28, at 425. Both articles note the possibility that defendants who are adolescent boyfriends of adolescent "victims" will receive enhanced sentences as a result of the categorical approach and suggest a fact-based approach as a solution to this problem.

51. 110 F.3d 382 (7th Cir. 1997) (en banc).

52. See *id.* at 384-85.

53. See *id.* at 385. For a definition of "information," see *supra* note 35.

The intermediate approach is also supported by the *Taylor* decision. In *Taylor*, the Court held that in a narrow range of cases, a court may examine the facts contained in the “indictment or information and jury instructions.”⁵⁴

The Application Notes to the USSG also lend support to this approach.⁵⁵ Application Note 1 to section 4B1.2 states that “[o]ther offenses are included as ‘crimes of violence’ if . . . the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted . . . , by its nature, presented a serious threat of potential risk of physical injury to another.”⁵⁶ Courts have interpreted the language “expressly charged” as indicating that a sentencing court’s inquiry should be limited to the conduct expressly charged in the indictment or information.⁵⁷ Similarly, Application Note 2 lends support to the intermediate approach by stating that “in determining whether an offense is a crime of violence . . . for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.”⁵⁸ The commentary indicates that a sentencing court should focus its inquiry on the facts contained in the charging papers, rather than every fact in the record or facts merely alleged in the complaint.⁵⁹

Because determinations made under this approach are based on the defendant’s conduct, and not just on the wording of the statute, it is more fair than the categorical approach. Like the categorical approach, the intermediate approach promotes conservation of judicial resources. When using the intermediate approach, a court does not hold evidentiary hearings to make crime of violence determinations. Rather, the court’s inquiry is restricted to certain documents.

However, this approach perpetuates “arbitrariness in decision-making.”⁶⁰ By restricting the court’s inquiry to the information or indictment, the information the court receives is dependent upon nuances in state law. In some states, a document labeled “complaint” is the only charging document used in a criminal proceeding.⁶¹ Under particular circumstances there is neither an information nor an indictment.⁶² If, when using the intermediate approach, a defendant’s statutory rape conviction relied only on a complaint, the federal sentencing judge cannot inquire into any of the facts underlying the conviction because there is not

54. *Taylor v. United States*, 495 U.S. 575, 602 (1990).

55. *See United States v. Lee*, 22 F.3d 736, 738-40 (7th Cir. 1994).

56. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, application note 1 (1998).

57. *See Lee*, 22 F.3d at 740; *see also United States v. Joshua*, 976 F.2d 844, 856 (3rd Cir. 1992), *abrogated by Stinson v. United States*, 508 U.S. 36 (1993); *United States v. Young*, 990 F.2d 469, 472 (9th Cir. 1993).

58. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, application note 2 (1998).

59. *See Lee*, 22 F.3d at 738.

60. *United States v. Shannon*, 110 F.3d 382, 391 (7th Cir. 1997) (Coffey, J., dissenting).

61. *See, e.g., CONN. GEN. STAT. ANN. § 54-46* (1994); *HAW. R. PENAL P. 7* (1999); *KAN. STAT. ANN. § 22-2905* (1995).

62. *See Shannon*, 110 F.3d at 402 (Coffey, J., dissenting).

an information or an indictment.⁶³ Furthermore, states that do require an indictment or information for convictions may not require the documents to contain extensive factual information.⁶⁴ Facts vital to crime of violence determinations, such as the victim's age, may not be contained in the information or indictments of some states,⁶⁵ whereas other indictments or information may contain many relevant, helpful facts. Therefore, under the intermediate approach, the decision making process of federal sentencing courts is dictated by the kinds of charging documents required by state law and the facts contained therein.

3. *Fact-based Approach*.—In *United States v. Flores*,⁶⁶ the Fifth Circuit upheld a district court's use of the fact-based approach in determining if the defendant's prior convictions were crimes of violence.⁶⁷ In examining the defendant's prior convictions, the district court heard testimony from the probation officer who prepared the defendant's pre-sentence report.⁶⁸ The pre-sentence report was based on the interviews of three county clerks.⁶⁹ The circuit court upheld the district court's use of these sources for determining if the defendant's convictions were for crimes of violence.⁷⁰

Some judges and scholars view the fact-based approach as the optimal approach for making crime of violence determinations because it allows courts to examine all the available facts surrounding the previous conviction.⁷¹ A fact-based approach appears to lead to fair results because it bases crime of violence determinations on the defendant's conduct, not the elements of the statute or facts contained in specific documents.

However, this approach does not always lead to fair results, as a court may base its crime of violence determinations on facts that have merely been alleged.⁷² The facts in the complaint may be contested, and if there was a plea bargain, they may not have been subject to a fact-finding process.⁷³ Therefore, by allowing a sentencing court to consider facts merely alleged in a complaint, the results may be both inaccurate and unfair.⁷⁴ This unfairness may be compounded in instances where there is a plea bargain.⁷⁵ A defendant who entered a plea to a lesser charge than what was indicated in the complaint may

63. *See id.*

64. *See id.* at 393-94.

65. *See id.*

66. 875 F.2d 1110 (5th Cir. 1989).

67. *See id.* at 1112-13. The court had to determine if the defendant's burglary convictions were for burglaries of dwellings. *See id.*

68. *See id.* at 1112.

69. *See id.*

70. *See id.* at 1113.

71. *See, e.g., Shannon*, 110 F.3d at 390-416 (Coffey, J., dissenting). *See generally* Bossing, *supra* note 28; Fleischmann, *supra* note 28.

72. *See Shannon*, 110 F.3d at 384-85.

73. *See id.*

74. *See id.*

75. *See Taylor v. United States*, 495 U.S. 575, 601-02 (1990).

then receive a sentence enhancement based on facts contained in the complaint to which he did not admit and that were never the subject of a judicial finding.

Another source of problems for the fact-based approach is the availability of evidentiary hearings to assist the court in making crime of violence determinations. Under this approach the court may use an evidentiary hearing to examine any and all facts concerning the prior conviction. The previous conviction may have occurred many years before the federal sentencing proceeding. Retrying the facts of the prior conviction places an undue burden on defendants forced to defend themselves against old allegations. Evidentiary hearings needed to make crime of violence determinations under this approach could be burdensome on victims as well. A court could make a statutory rape victim go through the trauma of testifying about an incident years later.⁷⁶

The fact-based approach also makes it possible for crime of violence determinations to be based on the availability of evidence and witnesses from the prior conviction. If a court cannot receive testimony because a witness is dead or unavailable given the limited information, the court may determine that a conviction was for a crime of violence; whereas, if they heard the evidence, their determination might have been otherwise. This result is patently unfair to defendants.

Furthermore, an inquiry into the facts underlying a previous conviction is a strain on judicial resources and would pose a heavy burden on sentencing courts.⁷⁷ In support of the intermediate approach over the fact-based approach, Judge Posner of the Seventh Circuit noted that “[i]f the district judge were required to go behind the charging document to determine the defendant’s criminal history, the evidentiary burden of exploring the circumstances of old crimes would potentially be borne in every case in which the defendant had a criminal history.”⁷⁸ The burden on sentencing courts would be great because of the frequency with which federal defendants have criminal histories and because the convictions the court would have to explore may have occurred many years ago in a jurisdiction “remote from that of the current sentencing.”⁷⁹

The factual approach suggested by Lewis Bossing in *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, is a good example of a fact-based approach that would lead to enormous strains on judicial resources.⁸⁰ Bossing suggests that the court’s focus be on the victim’s consent when making crime of violence determinations.⁸¹ Under Bossing’s approach, factors to be considered in determining whether the complainant gave meaningful consent to the sexual

76. *Contra* Bossing, *supra* note 28, at 1249-50.

77. *See Shannon*, 110 F.3d at 385.

78. *Id.*

79. *Id.*

80. *See* Bossing, *supra* note 28. In his Note, Bossing admits that “[i]nvestigation through a presentencing report and/or additional testimonial evidence may be necessary” for a determination under his approach. *Id.* at 1233.

81. *See id.* at 1231-46.

activity include the self-esteem of the complainant and the extent to which the individual "minor was aware that he or she could choose not to participate in sexual activity."⁸² Delving into the psyche of the individual victim in the way suggested by Bossing would be a tremendous strain on a court, if not an impossible task for a court to accomplish.

Lastly, a fact-based approach is unfair to the defendant because it does not put the defendant on notice that federal courts will consider a previous statutory rape conviction a crime of violence. One of the purposes of the USSG is to deter criminal conduct.⁸³ After receiving two convictions for crimes of violence, a defendant may be deterred from engaging in further criminal conduct in order to avoid receiving an enhanced sentence by virtue of his status as a career offender. However, deterrence cannot occur if the defendant does not know his conviction will be considered a crime of violence. According to deterrence theory, crimes and punishments must be articulated in advance in order for an individual to determine whether the particular activity is worth its consequences.⁸⁴ Under a fact-based approach a defendant does not know what facts concerning the prior conviction the court will examine or what facts will indicate to the court that a crime of violence has occurred. Hence, under the fact-based approach, a defendant could not be deterred because he could not be certain as to whether a federal sentencing court would consider his prior statutory rape conviction a crime of violence.

III. A LIMITED FACT-BASED APPROACH

Neither the fact-based, categorical, or intermediate approach leads to results that are fair, accurate, or efficient. This Note proposes a method for determining if a prior statutory rape conviction is a conviction for a crime of violence that is fair to defendants, leads to uniform sentencing, leads to certainty in sentencing and promotes efficient use of judicial resources. Under this method, courts would limit their inquiry to facts from which a "serious risk of physical injury to another" could be inferred. If such facts are present, then the court should deem the prior statutory rape conviction a crime of violence. Under this approach, the facts to be considered are not likely to be contested. Therefore, a court may look to any source for these facts.

A. *Facts to Be Considered*

1. *Age of the Victim.*—The age of the victim should be a factor considered when making crime of violence determinations because young children are

82. *Id.* at 1237.

83. *See* 18 U.S.C. § 3553(a)(2)(B) (1993).

84. *See* RICHARD J. BONNIE ET AL., CRIMINAL LAW 36 (1997) (stating deterrence theory holds that humans are rational and hedonistic, and "individual conduct presumably [is] based on a utilitarian calculation of pain and pleasure, [and] criminal acts [can] be deterred by a credible threat of a penalty sufficient to outweigh the expected gain from wrongdoing").

incapable of meaningful consent to sexual activity.⁸⁵ In considering the age of the victim, the court should select⁸⁶ an age at which most children are incapable of meaningfully consenting to sex.⁸⁷ If the victim of the statutory rape was younger than this age and the offender was over eighteen years of age at the time of the offense, the conviction for that statutory rape should be considered a conviction for a crime of violence. For example, if the court selects the age of twelve, then the statutory rape of an eleven-year-old by someone above the age of eighteen would be considered a crime of violence. In such settings, the application of force or coercion can be inferred. Moreover, as force or coercion was present in the sexual encounter, a serious risk of physical injury can be equally inferred.

The assertion that a child is “incapable of consenting or resisting; [and] thus, an adult who has intercourse with a child is always engaged in forcible and non-consensual conduct” is well supported.⁸⁸ The inability of young children to consent to sexual activity has long been recognized.⁸⁹ “Blackstone stated more than two hundred years ago: ‘[T]he consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.’”⁹⁰ The Kentucky Supreme Court has similarly noted the long history of the law’s recognition that children are incapable of consent, stating:

The conclusive presumption of inability to consent is not of recent

85. See Phipps, *supra* note 1, at 117.

86. The word “select” is used here tentatively because the courts themselves should not have to select or determine the age at which a child is incapable of consent. Rather, the United States Sentencing Commission should select the age for two reasons. First, the courts’ resources are limited, and the Sentencing Commission is better equipped to digest scientific data and consider policy issues necessary in selecting an appropriate age. Second, the goals of uniformity and certainty in sentencing are better served if the Commission selects the age instead of the courts. If courts select the age, each circuit or district court may select different ages. However, even if courts select the age themselves, there will at least be uniform decisions within that court, which is an improvement over the approaches courts currently use.

87. Because individual children become emotionally and psychologically mature at different ages, the age selected by the Commission should be a rather young age to ensure as much as possible that the age is one at which most children in the population will be incapable of giving meaningful consent. See Phipps, *supra* note 1, at 118 nn.474-75. Because of the limited knowledge and resources to determine this age, this Note does not propose any particular age for the courts to adopt. However, from the limited research reviewed, this Note is written with an approximate age in mind, somewhere in early adolescence, from ten to twelve years old. See Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1253 (1998) (“Below [the] ages [of ten and twelve], sexual activity is generally conceded to be socially undesirable, in part because it is physically and emotionally dangerous for the young female involved.”) (internal citation omitted).

88. Phipps, *supra* note 1, at 42.

89. See *id.* at 33-34.

90. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *212).

vintage. It has been with us at least from the reign of Queen Elizabeth of England (1558-1603). Coming to this country as a part of our common law, the doctrine has universally been spoken to by the state legislative bodies. The truth of the facts upon which the presumption has been based are beyond cavil. The state has a recognized interest in the welfare of its citizens who, by reason of age or physical or mental disability, cannot care for themselves. So it is with children of tender years.⁹¹

Young children are incapable of giving meaningful consent because they lack the "knowledge of sexual activity to understand the nature of their consent"⁹² and the maturity to understand the consequences involved with sexual activity.⁹³ For example, in ruling that statutory rape of a victim below the age of thirteen is a crime of violence, Judge Posner of the Seventh Circuit noted the limited knowledge and understanding of thirteen-year-old children.⁹⁴ By comparison, the law presumes children to be incompetent in a variety of other areas. "For example, girls and boys under sixteen generally may not drink alcohol, buy tobacco products, marry, drive, or vote."⁹⁵ Also, the common law allows minors to avoid their contracts in order to protect minors from their own immaturity and to discourage adults from taking advantage of the vulnerable minors.⁹⁶

Force or coercion can also be inferred from a sexual encounter between an adult and a young child because of the disparity in bargaining power between the adult and the child. Children's lack of knowledge about sexual experiences and the consequences of those experiences, as discussed above, contribute to this disparity. The difference in physical size between the adult and the child also leads to unequal bargaining power.⁹⁷ Furthermore, the power structure that exists between children and adults leads to unequal bargaining power.⁹⁸ "Adults

91. *Payne v. Commonwealth*, 623 S.W.2d 867, 875 (Ky. 1981). The court made this statement in justification of the state's statute that deems persons less than sixteen years old incapable of consenting to sex. *See id.*

92. Phipps, *supra* note 1, at 120. (citing DAVID FINKELHOR, *CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH* 17 (1984)).

93. *See* JUDITH ENNEW, *THE SEXUAL EXPLOITATION OF CHILDREN* 62 (1986); Seymour L. Halleck, *Emotional Effects of Victimization*, in *SEXUAL BEHAVIOR AND THE LAW* 673, 677 (Ralph Slovenko ed., 1965).

94. *See United States v. Shannon*, 110 F.3d 382, 387-88 (7th Cir. 1997). "A [thirteen] year old is unlikely to have a full appreciation of the disease and fertility risks of intercourse, an accurate knowledge of contraceptive and disease-preventative measures, and the maturity to make a rational comparison of the costs and benefits of premarital intercourse." *Id.* at 387 (citations omitted).

95. Guerrina, *supra* note 87, at 1261-62.

96. *See* ALLAN FARNSWORTH, *CONTRACTS* § 5.6, at 377-80 (2d ed. 1990).

97. *See* ENNEW, *supra* note 93, at 62.

98. This disparity in bargaining power between adults and children is the rationale behind the common law practice of allowing minors to rescind their contracts. *See* Guerrina, *supra* note 87, at 1262-64.

control all of a child's resources (food, shelter, money, clothing), children are taught to obey adults, adults exercise extensive physical control over children, and adults are authority figures who punish children."⁹⁹ Because of this disparity in bargaining power between children and adults, it is impossible for a young child to give meaningful consent to sexual activity with an adult, because a young child is not truly capable of saying "no" to that adult.¹⁰⁰

An acknowledged problem with the "age of victim" factor in the limited fact-based approach is that it requires the court, the sentencing commission, or other policy body to take up the difficult task of determining an age at which meaningful consent cannot be given.¹⁰¹ State legislatures have struggled with this responsibility in forming their own statutory rape laws, as is evidenced by the variety of "ages of consent" among jurisdictions.¹⁰² However, the difficulty in determining the age at which children are incapable of giving meaningful consent should not override the goal of giving enhanced sentences to those offenders who have engaged in "conduct that presents a serious potential risk of physical injury to another."¹⁰³ An adult who has sex with a young child who is incapable of consenting has explicitly engaged in conduct that presents a serious potential risk of physical injury to another.

2. *Age Disparity*.—If a great disparity in age between the statutory rape victim and the defendant exists, a serious risk of physical injury to the victim can be inferred, because of the difference in size and power between the victim and the defendant.¹⁰⁴ The inclusion of age disparity as a factor in the limited fact-based approach allows sentence enhancements for adults who use their greater size, knowledge, or experience to coerce a child into engaging in sexual activity

99. Phipps, *supra* note 1, at 120.

100. *See id.* at 119. "Consent is only possible if a person knows what he or she is consenting to and has the freedom to say yes or no. With children, neither of these conditions can be fulfilled." *Id.*

101. *See supra* note 86. Until the United States Sentencing Commission determines the appropriate age, courts should determine the age that they will use in determining whether a statutory rape conviction was a crime of violence.

102. For example, in two states the most serious penetration offense applies when the victim is under ten years of age, whereas in one state the most serious penetration offense applies when the victim is under eighteen years of age. *See Phipps, supra* note 1, at 57-58 tbl.1. *See id.* at 55-62 for an illustration and discussion of the disparity in "ages of consent" among state statutory rape provisions, including a state-by-state breakdown of the age under which sexual penetration of a child by an adult is a crime, also known as the age of consent.

103. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (1998).

104. Again, it will be difficult to determine an appropriate age disparity that reflects a situation in which, for the majority of the population at the prescribed age difference, the offender would have such an advantage over the victim in size, power, knowledge, and/or experience that his/her conduct could be construed as coercive. Because the size, power, knowledge, and experience of the members of the population vary, this Note suggests erring on the side of making the age disparity too large. Therefore, there should be a requirement that the victim be under the age of fourteen and the offender be at least six years older than the victim.

while respecting the sexual autonomy of older adolescents to engage in sexual conduct with their peers. This factor may prevent defendants who were "barely" adults when they were convicted of statutory rape for having sex with their under-aged girlfriends from being given enhanced sentences and give enhanced sentences to those who coerced a child into having sex.¹⁰⁵ The inclusion of this factor reflects a trend in modern statutory rape law in which an age difference between the defendant and the complainant is required.¹⁰⁶

3. *Relationship of the Parties.*—If a familial¹⁰⁷ or guardian relationship exists between the statutory rape victim and the defendant, use of force or coercion can be inferred.¹⁰⁸ The same issues of disparity in bargaining power discussed in regard to age disparity are even more profound if the adult is in a position of authority over the child, such as a parent, uncle, or guardian.¹⁰⁹ The Model Penal Code's "Corruption of Minors and Seduction" provision recognizes that even much older children and young adults can be subject to domination by someone who occupies a position of control and disciplinary authority over them.¹¹⁰ This provision prohibits guardians or people "otherwise responsible for the general supervision of [a person's] welfare" from having sexual intercourse with that person if he or she is less than twenty-one years old.¹¹¹ Research indicates that there is greater harm to the victim if he or she has a relationship to the offender.¹¹² Because force or coercion can be inferred from a parental, familial, or guardian relationship with the victim, a serious potential risk of physical injury to the victim can be inferred.

Determining precisely what relationships should fall within this category

105. Incidents in which boyfriends have sex with their girlfriends who are their peers are routinely prosecuted as statutory rape in some jurisdictions. *See Phipps, supra* note 1, at 121 n.490. "The Model Penal Code commentators consider it 'harsh and unreasonable' to punish a person for engaging in sexual activity with a willing partner 'whom society regards as a fit associate in a common educational and social endeavor.'" *Id.* at 62 (quoting MODEL PENAL CODE § 213.3 cmt. 2 (1980)).

106. Many states include an age difference between the defendant and the victim as an element in the state's statutory rape provisions. *See Phipps, supra* note 1, at 62.

107. Research indicates that in about twenty-five percent of all cases of "statutory rape," the abuser is a relative of the victim. *See Phipps, supra* note 1, at 132.

108. Several jurisdictions have enacted "statutory rape" statutes that make the relationship of the offender to the victim an aggravating factor, warranting increased punishment. *See id.* "A few states have created specific offenses applicable only to family members in a custodial relationship with the victim, but the language of most statutes includes family members and non-family members." *Id.* at 68-69 (internal citations omitted).

109. *See id.* at 120.

110. MODEL PENAL CODE § 213.3 (1980).

111. *Id.* § 213.3 cmt. 3 at 388. "[T]he guardian or person similarly situated bears a special responsibility for guidance of his ward. Betrayal of that obligation by sexual intimacy is decidedly wrongful even if the child is old enough to take care of himself in most situations." Phipps, *supra* note 1, at 23 (citations omitted).

112. *See Phipps, supra* note 1, at 132.

may be difficult. State law addressing this question vary.¹¹³ “In some states the provision applies only to parental figures. In others it extends to permanent or temporary caregivers, such as school teachers and youth leaders. In some states broad language covers many additional people in a position to exert authority over the child.”¹¹⁴

B. Benefits of the Limited Fact-Based Approach

The limited fact-based approach alleviates many of the problems present in the approaches courts currently use to make crime of violence determinations. The problems raised by the other three methods can be grouped into two basic categories: inefficiency and unfairness. The traditional fact-based method is inefficient because it requires that courts examine all the facts surrounding the previous statutory rape conviction.¹¹⁵ Examining all the facts surrounding the prior conviction is also unfair, because it leads to uncertainty about the sentence that will be imposed.¹¹⁶ Furthermore, the traditional fact-based approach is unfair because, in essence, it allows the sentencing courts to retry defendants prior convictions.¹¹⁷ The intermediate and categorical approaches are similarly unfair because they lead to arbitrary and potentially inaccurate decisions.¹¹⁸ The limited fact-based approach alleviates these problems and furthers the goal of uniform sentencing.

1. *Efficiency.*—The limited fact-based approach is an efficient method for determining whether a defendant’s prior statutory rape conviction is a conviction for a crime of violence. In contrast to the traditional fact-based approach, the limited fact-based approach conserves the court’s time and resources by limiting its inquiry to specific facts indicative of conduct that present a serious potential risk of physical injury to another. The court may look to any source to ascertain whether a statutory rape conviction is a conviction for a crime of violence, but should only consider: (1) the age of the victim; (2) the age disparity between the victim and the offender; and (3) the relationship between the victim and the offender.

Furthermore, the limited fact-based approach is efficient because courts are likely to more easily obtain the facts that are determinative in the approach. Discovering the age of the victim, the age of the offender, and the relationship between the victim and the offender is not likely to be overly burdensome on sentencing courts. The court should be able to discover these facts with a minimal use of judicial resources.

The sentencing court should be able to easily discover the victim’s age

113. *See id.*

114. *Id.*

115. *See* discussion *supra* Part II.B.3.

116. *See id.*

117. *See id.*

118. *See* discussion *supra* Parts II.B.1-2.

because the age of the victim is an element of the crime of statutory rape.¹¹⁹ For example, sometimes the age of the victim is contained in the charging papers.¹²⁰ The age of the victim may also be in the record of the prior trial, if such a record exists.

Furthermore, the age of the victim is not likely to be contested. Although a defendant accused of statutory rape may contend that he did not know the victim's age or that he thought the victim was older, the actual fact of the victim's age is not likely to be a contested fact. Even if the only way to determine a victim's age is by having her testify at an evidentiary hearing, the testimony should not take a great amount of time. The only question she needs to answer is "What is your date of birth?" Furthermore, when the victim only has to testify as to her age, testifying for the sentencing court should not be traumatic or painful for her. In contrast, under the traditional fact-based approach, testifying during the federal sentencing proceeding may be traumatic for the statutory rape victim because the testimony may consist of all the facts surrounding the prior crime. Even so, it is unlikely that the victim's testimony at an evidentiary hearing will be the only means of ascertaining the victim's age.

Attaining the age of the offender and the age difference between the offender and the victim should also be easy. The defendant's age or date of birth is likely contained in police records. If the defendant's age is not found in the police records, the sentencing court could require the defendant to show proof of his date of birth. Furthermore, if the defendant's statutory rape conviction was rendered under a statute in which a particular age difference between the offender and the victim was an element, the difference between the defendant's age and the age of his victim might be indicated by the statutory language.

Determining the relationship between the parties may require more judicial resources than the prior two factors. If the defendant's previous conviction was under a statute in which the relationship of the parties was an element, the relationship between the victim and the offender would be found in the statutory language or in the information or indictment.¹²¹ However, if the information could not be discovered by any other source, the court may examine family records or hear testimony to determine the relationship of the parties.

2. *Fairness.*—The limited fact-based approach is fair because the facts examined under the approach are indicative of whether the defendant's conduct presented a serious potential risk of physical injury.¹²² In contrast to the intermediate approach, which examines facts detailed in information or indictments as required by varying state laws, the limited fact-based approach examines facts that will indicate only those offenders who are truly culpable and dangerous.

Crime of violence determinations made using the limited fact-based approach would also be fair because they would give enhanced sentences to the most

119. See Phipps, *supra* note 1, at 52.

120. See, e.g., *United States v. Shannon*, 110 F.3d 382, 384 (7th Cir. 1997).

121. See *supra* note 108 and accompanying text.

122. See discussion *supra* Part III.A.1-3.

culpable statutory rapists. Those adults who engage in sex with young children are deemed more culpable than those who engage in sex with older adolescents. This idea is supported by the modern trend in American statutory rape law to grade statutory rape offenses according to the age of the victim.¹²³ “[M]ost states now divide sex offenses against children into two or three categories, ranging from the most serious offenses applicable to only the youngest children to the less serious offenses applicable to the oldest adolescents”¹²⁴ The Model Penal Code’s provisions concerning sexual activity with minors also recognizes the increased culpability of those who engage in sex with young children as compared with those who engage in sex with adolescents.¹²⁵ In the Model Penal Code, the most serious offense, rape, applies to “consensual” sexual intercourse with children less than ten years old.¹²⁶ By setting the age of consent for rape remarkably low, the drafters of the Model Penal Code drew a clear line for the most culpable offenders.¹²⁷ The drafters of the 1980 commentary to the Model Penal Code felt that “those who engage in intercourse with adolescents are neither as dangerous nor as morally reprehensible as those who engage in such conduct with very young children.”¹²⁸

As well as giving enhanced sentences to the most culpable offenders, the limited fact-based method avoids giving statutory enhancements to less culpable offenders, those who engage in consensual sex with their peers. Because of the age disparity factor, this method should prevent defendants who were “barely” adults when they were convicted of statutory rape from being given enhanced sentences.¹²⁹ Giving enhanced sentences to individuals who engage in consensual sexual activity with their peers is not only unfair but ignores the

123. See Phipps, *supra* note 1, at 55.

124. *Id.*

In Virginia, for example, non-forcible sexual intercourse with a child under the age of thirteen is rape, intercourse with a child aged thirteen or fourteen is carnal knowledge, and intercourse with a child who is fifteen, sixteen, or seventeen is “causing or encouraging acts rendering children delinquent.” The older the age, the less serious the offense, with offenses involving children above the age of fourteen classified as misdemeanors.

Id. at 57-59. In most states, the most serious offense applies when the victim is under thirteen or fourteen years old. See *id.* at 57.

125. See MODEL PENAL CODE § 213.1 (1980).

126. See *id.*

127. See Phipps, *supra* note 1, at 19-20.

128. MODEL PENAL CODE § 213.3 cmt. 2 at 379 (1980).

129. This Note does not propose that prosecution for statutory rape based on sexual conduct between peers is wrong or unjustified. Rather it merely proposes that such conduct does not warrant an enhanced sentence for a future crime. If the defendant has two or more other previous convictions for crimes of violence (exclusive of any statutory rape convictions), he should receive an enhanced sentence irrespective of his conduct concerning the statutory rape conviction. This Note merely asserts that an enhanced sentence should not be imposed because of a statutory rape conviction that was based on sexual activity with a peer.

reality of adolescent sexuality.¹³⁰ The limited fact-based approach respects the autonomy of adolescents to sexually experiment with their peers while giving enhanced sentences to those who are truly culpable.

In addition to being more culpable, adults who have sex with young children are more dangerous because their recidivism rates are high and psychological "rehabilitative" treatment appears to be ineffective. One study found that forty-three percent of the 136 extrafamilial child molesters examined in the study committed a new violent or sexual offense within less than six and a half years after release from a maximum security psychiatric institution.¹³¹ Likewise, fifty-eight percent of the study's subjects were arrested for an offense of some kind or were returned to the psychiatric institution during the study's time period.¹³² The study also found that inappropriate age choice in a sexual target was related to repeat convictions for sexual offenses.¹³³ In addition, the study found that behavioral treatment had no effect on recidivism.¹³⁴ By giving enhanced sentences to defendants who engage in sexual intercourse with young children, courts using the limited fact-based method would be giving enhanced sentences to defendants from whom society needs increased protection.

The limited fact-based approach also alleviates a problem that exists in the categorical method, wherein crime of violence determinations turn on the wording of state statutes. Under the limited fact-based approach, crime of violence determinations would not be based on the wording of the statutory rape statute under which the defendant was convicted, but on the defendant's own conduct. Defendants who engage in the same behavior in different jurisdictions will be treated the same, even though the language of the statutes under which they were convicted is different.

This approach is fair to defendants because it will not require that prior convictions be retried, as did the traditional fact-based approach. If evidentiary hearings are needed under the limited fact-based approach, they will most likely be brief. Courts will look only to the objective factors, which can be easily found, when making crime of violence determinations. Furthermore, the

130. Eighty-two percent of teenagers have experienced sex. See Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 60 n.256 (1994) (citing ALAN GUTTMACHER INSTITUTE, SEX AND AMERICA'S TEENAGERS (1994)). Fifty-three percent of females aged fifteen to nineteen have had sexual intercourse. See *id.* "Other sources report even higher incidents of sexual activity: three-quarters of American teens having had sex by the time they reach age [twenty]; . . . and among [fifteen]-year-olds, one-third of boys and [twenty-seven percent] of girls have had sexual intercourse." *Id.* (citing Nancy Gibbs, *How Should We Teach Our Kids About Sex?*, TIME, May 24, 1993, at 60).

131. See Marnie E. Rice et al., *Sexual Recidivism Among Child Molesters Released from a Maximum Security Psychiatric Institution*, 59 J. CONSULTING & CLINICAL PSYCHOL. 381, 381-386 (1991).

132. See *id.*

133. See *id.* Inappropriate age choice was operationally defined in the study as either a juvenile age 15 or under, or juvenile at least five years younger than the offender. See *id.*

134. See *id.*

defendant will not be forced to present his defense to the statutory rape charge to the sentencing court because the court's focus will be on objective factors.

Furthermore, unlike the three approaches currently used by courts, the limited fact-based method furthers the United States Sentencing Commission's goal of providing uniform sentencing.¹³⁵ Once a court or the United States Sentencing Commission¹³⁶ determines the victim's age, the age disparity, and the relationship between the offender and the victim that are indicative of "conduct that presents a serious potential risk of physical injury"¹³⁷ each prior conviction that involves one of these factors will be considered a crime of violence. Neither the statutory language for statutory rape, the amount of information contained in the charging papers, nor the prerogative of the sentencing judge will be variables.

Finally, the limited fact-based approach is fair because it provides certainty in sentencing. One of the primary flaws of the traditional fact-based analysis is that a defendant has no way of knowing what evidence will be available to the court,¹³⁸ what evidence the court will examine, and what factors the court will consider important in making crime of violence determinations. The problem of uncertainty is present in the intermediate and categorical approaches as well. Under these approaches, a defendant would not know what specific facts or statutory language will lead the court to conclude that the prior conviction is for a crime of violence.

By contrast, if courts adopt the limited fact-based approach, defendants will know exactly which facts the court will examine, and what weight each of the factors will have in determining whether the prior conviction should be deemed a crime of violence. Both the defendant and the public would know that a statutory rape conviction that involved any of the three objective factors discussed earlier would be considered a crime of violence.

In addition to providing fairness, this certainty furthers the sentencing goal of deterrence.¹³⁹ Under the limited fact-based approach, if a defendant knows his own age, the age of the victim, and their relationship, he can know whether his statutory rape offense will be considered a crime of violence. Because a defendant can know at the time of his statutory rape conviction whether that conviction will be considered a crime of violence by federal sentencing courts, the specter of the enhanced sentence that accompanies career offender status may deter him from committing future violent or controlled substance offenses.

C. Anticipated Criticisms of the Limited Fact-Based Approach

The limited fact-based approach proposes a bright-line rule. A statutory rape

135. See 28 U.S.C. § 991(b)(1)(B) (1993).

136. See *supra* note 86 and accompanying text.

137. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (1998).

138. For example, a witness with relevant information may have died in the time between the statutory rape conviction and the federal sentencing proceeding.

139. See *supra* note 85 and accompanying text (discussing the importance of certainty for deterrence).

conviction in which the victim was below a certain age, a significant age difference between the victim and the offender existed, or a certain relationship between the victim and the offender existed will be considered a crime of violence. Bright line rules are often criticized as inflexible. While the limited fact-based method is inflexible, its inflexibility leads to certainty, uniformity, and fairness. While flexible rules are appealing, with flexibility comes other problems, such as unfairness, uncertainty, and non-uniformity. For example, the traditional fact-based approach is attractive because of its employment of flexibility and sensitivity to individual case facts. However, this case-by-case analysis also weakens the traditional fact-based method, as it leads to uncertain and non-uniform results.¹⁴⁰

Furthermore, bright-line rules are favorably applied in other contexts, including imposing criminal liability for statutory rape.¹⁴¹ However, the bright-line rule proposed in the limited fact-based analysis does not impose criminal liability. It is merely a tool to be used by the courts to determine which convictions are convictions for crimes of violence. Criminal liability for the statutory rape and for the current federal offense have already been imposed, and this rule takes no part in their imposition.

The limited fact-based approach might be criticized as being underinclusive, for only those statutory rapists who engaged in sexual intercourse with young children, children who were significantly younger than them, or children to whom they were related or of whom they were guardians, will be considered to have committed crimes of violence under this proposed method.

In response to this criticism, while the limited fact-based approach is a bright-line rule, it is better that such a rule be underinclusive than overinclusive. Because the court will focus on the victim's age, the age difference between the offender and the victim, and the relationship between the offender and the victim as indicators of her ability to consent, rather than inquiring as to the victim's capacity to consent, the rule should err on the side of underinclusiveness to ensure fairness to defendants.

Moreover, defendants facing an enhanced sentence have already been convicted of and served sentences for statutory rape. The limited fact-based method should only be used to determine which defendants are deserving of enhanced sentences for federal offenses under the USSG. This method does not change the sentence imposed for the statutory rape offense itself. Regardless of the outcome of the analysis of the defendant's conviction under this method, he is still guilty of statutory rape and has still been punished for it.

CONCLUSION

When Congress enacted the Sentencing Reform Act of 1984, it set forth

140. See discussion *supra* Part II.B.3.

141. In many sexual penetration statutes, only proof of the age of the victim and proof of the act are required. See Phipps, *supra* note 1, at 52. Some jurisdictions allow a defense of reasonable mistake of age, but usually only when older adolescent victims are involved. See *id.* at 51.

goals for the newly formed United States Sentencing Commission.¹⁴² The Sentencing Commission was to promulgate sentencing policies and practices that would lead to “adequate deterrence to criminal conduct,”¹⁴³ “provide certainty and fairness in . . . sentencing,”¹⁴⁴ and avoid “unwarranted sentencing disparities.”¹⁴⁵ The United States Sentencing Commission drafted the career offender provision of the USSG with these goals in mind.¹⁴⁶ However, these goals are not being achieved. The methods courts use to determine whether a prior statutory rape conviction is a conviction for a crime of violence are faulty and lead to unfair, non-uniform, and uncertain results.

This Note proposes a method that provides fairness, certainty, and uniformity in the sentences imposed. By providing certainty, the limited fact-based method makes the commission’s goal of deterrence to criminal conduct possible. In addition to furthering these goals, the limited fact-based approach also provides a method for making crime of violence determinations manageable for the court. This method does not require courts to examine every fact surrounding the prior conviction, but merely to examine three easily obtainable facts. In doing so, the limited fact-based approach conserves judicial resources.

Courts, posed with determining whether a prior statutory rape conviction is a conviction for a crime of violence, can meet the goals Congress set for the sentencing commission. The unfairness and inefficiency present in crime of violence determinations, which are made using the current methods, do not have to exist. Using the limited fact-based method, Congress’s goals can be met in a way that is fair to defendants and manageable for the courts.

142. See 28 U.S.C. § 991(b)(1) (1993).

143. 18 U.S.C. § 3553(a)(2)(B) (1993).

144. 28 U.S.C. § 991(b)(1)(B) (2000).

145. *Id.*

146. See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 and ch.4, pt. A. introductory cmt. at 283 (1998).

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